Supreme Court, U.S.
FILED

(1)

94 883 OCT 2 8 1994

No._____

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1994

Commonwealth of Virginia,
at the Relation of
The State Corporation Commission, *Petitioner*,
v.
National Home Insurance Company,
(a Risk Retention Group), *Respondent*.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
Stewart E. Farrar
Solicitor General
State Corporation Commission
Anthony Gambardella
General Counsel
Peter B. Smith
Senior Counsel
Michael D. Thomas
Assistant General Counsel
State Corporation Commission
Office of General Counsel
P. O. Box 1197
Richmond, Virginia 23209

Patrick H. Cantilo
Counsel of Record

Randolph N. Wisener
Steven E. Adkins
Cantilo, Maisel & Hubbard, L.L.P.
Suite 1700
111 Congress Avenue
Austin, Texas 78701
(512) 478-6000
(512) 404-6550 (Telecopier)

Counsel for Petitioner

October 1994

26 pp

QUESTIONS PRESENTED

Whether the Virginia Supreme Court, by redeciding the precise federal question previously decided by the federal district court between the same parties, erred in not giving the earlier decision preclusive effect?

Whether the Virginia Supreme Court erred in finding, and then resolving, a perceived ambiguity in the legislative history of the Risk Retention Act so as to infer extraordinary qualifications, not plainly stated, for state courts in violation of the Tenth Amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT UNDER RULE 29.4(b)	2
STATEMENT	2
A. Virginia Has Assigned the Relevant Jurisdiction to The State Corporation Commission	4
B. Proceedings Below	5
C. Federal Questions Presented to the Virginia Supreme Court	9
REASONS FOR GRANTING THE PETITION	10
I. The Decision of the Virginia Supreme Court Casts Substantial Doubt not Only on the Enforceability of Certain Key Provisions of the Risk Retention Act, but More Fundamentally, on the Ability to Establish and Govern its Own Courts.	10

II. The Virginia Supreme Court's Failure to Give Deference to the Federal Court Decision, in Derogation of Settled Principles of Federalism, is in Direct Conflict with Established Jurisprudence of this Court. 12

III. The Virginia Supreme Court's Construction of the Risk Retention Act is Contrary to this Court's "Plain Statement" Jurisprudence and Causes the Risk Retention Act to Violate the Tenth Amendment to the United States Constitution 14

A. Any Intention by Congress to Disrupt the Constitutional Balance of Power between State and Federal Governments must be Clear on the Face of the Statute and May Not Rest on Mere Ambiguity. 14

B. As Construed by the Virginia Supreme Court, the Questioned Provisions of the Risk Retention Act Violate the Tenth Amendment. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases	Page
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)	7
Atlas Underwriters, Ltd. v. State Corporation Comm'n, 375 S.E.2d 733 (Va. 1989)	6
BFP v. Resolution Trust Corp., _ U.S. _, 114 S. Ct. 1757 (1994)	16
Calder v. Bull, 3 U.S. 386 (1798)	14
Chisom v. Roemer, 501 U.S. 380 (1991)	15
Deposit Bank v. Frankfort, 191 U.S. 499 (1903)	13
Eddings v. Oklahoma, 455 U.S. 104 (1982)	9
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)	17
Gregory v. Ashcroft, 501 U.S. 452 (1991)	11, 15-18
Hathorn v. Lovorn, 457 U.S. 255 (1982)	10
Heck v. Humphrey, _ U.S. _, 114 S. Ct. 2364 (1994)	13
Hill v. Martin, 296 U.S. 393 (1935)	6
Home Warranty Corp. v. Caldwell, 777 F.2d 1455 (11th Cir. 1985), *cert. denied*, 479 U.S. 852 (1986)	11
Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941)	13
Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 23-24 (1982)	6
National League of Cities v. Usery, 426 U.S. 833 (1976)	17
New York v. United States, _ U.S. _, 112 S. Ct. 2408 (1992)	17, 18
North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982)	7
Park N' Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 (1985)	5
Pennsylvania v. Bruder, 488 U.S. 9 (1988)	11
Petrus v. Robbins, 83 S.E.2d 408 (Va. 1954)	10
Powell v. Nevada, _ U.S. _, 114 S. Ct. 1280 (1994)	11
Prentis v. Atlantic C. L. Co., 211 U.S. 210 (1908)	4, 6
Rice v. Rehner, 463 U.S. 713 (1983)	7
Roudebush v. Hartke, 405 U.S. 15 (1972)	6
Stoll v. Gottlieb, 305 U.S. 165 (1938)	9, 12, 13

Trust Co. v. Commonwealth, 145 S.E. 326 (Va. 1928), *rev'd sub nom. Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929) 9
United States v. Morton, 467 U.S. 822 (1984) 5
Virginia Nat'l Bank v. Virginia, 320 F. Supp. 260 (E.D. Va. 1970) 6
Winchester & S. R. Co. v. Commonwealth, 55 S.E. 692 (Va. 1906) 4

Constitutions

U.S. CONST. AMENDMENT X 2
VA. CONST. ART. IX, §§ 1 and 2 4

Statutes and Rules

15 U.S.C. § 3902(a)(1)(H) (West Supp. 1994) 5
15 U.S.C. § 3902(e)(2) 5
15 U.S.C. §§ 3901-3906 2
28 U.S.C. § 2403(a) 2
28 U.S.C. § 451 2
28 U.S.C. § 1257 (West 1993) 1
VA. CODE ANN. Title 38.2, Chapter 51 4
VA. CODE ANN. § 38.2-220 (Michie 1994) 4
VA. CODE ANN. §§ 12.1-12 and -13 (Michie 1993) 4
VA. CODE ANN. §§ 38.2-5100 and -5111 (Michie 1994) 4

Treatise

18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4468 (1981) 13

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Commonwealth of Virginia,
at the Relation of
The State Corporation Commission, *Petitioner*,

v.

National Home Insurance Company,
(a Risk Retention Group), *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The State Corporation Commission of the Commonwealth of Virginia respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia, (App., *infra*, at 1a-16a), is reported at 248 Va. 161 and at 444 S.E.2d 711. The opinion of the United States District Court for the Eastern District of Virginia, (*id.* at 17a-45a), is reported at 838 F. Supp. 1104.

JURISDICTION

The Virginia Supreme Court rendered its decision on June 10, 1994, (App., *infra*, at 16a), and denied the Petition for Rehearing, (*id.* at 49a), and issued its mandate (*id.* at 51a) on August 1, 1994 (*id.*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (West 1993).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 3902(a)(1)(H) of the Products Liability Risk Retention Act, 15 U.S.C. §§ 3901 through 3906, (App., *infra*, at 72a-88a) and the Tenth Amendment to the United States Constitution (the "Tenth Amendment"), which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,

are implicated here.

STATEMENT UNDER RULE 29.4(b)

Since this proceeding draws into question the constitutionality of certain provisions of the Risk Retention Act, 15 U.S.C. §§ 3901 through 3906, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

While there are parallel proceedings in federal court, no court of the United States, as defined by 28 U.S.C. § 451, has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT

In enacting the Risk Retention Act, Congress has provided for a regulatory framework in which State and Federal legislation are designed to work in conjunction with each other with regard to a unique type of insurer. Leaving to the states the task of regulating risk retention groups, in the main, the Risk Retention Act allocates various aspects of that responsibility between

chartering and non-chartering states. After, and despite, a well reasoned analysis of that framework by the Federal Court, which recognized the judicial role given to the Commission in that regulatory structure by Virginia's Constitution and General Assembly, the Virginia Supreme Court assigned to the Risk Retention Act an extraordinary interpretation that divested the Commission of its role and left the citizens of Virginia at a regulatory disadvantage compared to those of her sister states. The Virginia Supreme Court reached this result by addressing the interpretation to be given a term in the federal statute, though the issue had been resolved previously by the Federal Court in litigation between exactly the same parties in a closely related proceeding. The Virginia Supreme Court not only failed to give preclusive effect to the Federal Court's decision, but effectively overturned it by reaching a precisely contrary conclusion on the same federal question.

In June of 1993, the State Corporation Commission of the Commonwealth of Virginia (the "Petitioner" or the "Commission") entered an injunction (the "Injunction") against Respondent based on a finding that Respondent was financially impaired. (App., *infra*, at 47a-48a). Respondent appealed the issuance of the Injunction to the Virginia Supreme Court and, simultaneously, filed an action against the Commission and its individual members in the United States District Court for the Eastern District of Virginia (the "Federal Court") seeking relief from the Injunction. In the appeal to the Virginia Supreme Court and in the action before the Federal Court, Respondent alleged that because the Commission was not institutionally independent, it was not a "court of competent jurisdiction" under the Risk Retention Act and, therefore, it did not have jurisdiction to enter the Injunction. The Federal Court specifically held that the Commission could be a court of competent jurisdiction under the Risk Retention Act. (App., *infra*, at 45a). Approximately six months later, a majority of the Virginia Supreme Court, without giving effect to, or in any way acknowledging the Federal Court decision, held that (i) based on a perceived ambiguity in the Risk Retention Act, Congress had imposed federal qualifications on state judicial tribunals, and

(ii) the Commission was not a court of competent jurisdiction under the Risk Retention Act because it did not meet these perceived federal qualifications. (*Id.* at 11a). This case, therefore, presents the question of whether Congress can be held to have imposed on state courts qualifications beyond those established by the state's constitution and legislature.

A. Virginia Has Assigned the Relevant Jurisdiction to The State Corporation Commission

It is clear that the constitution and statutes of Virginia assign to the Commission the requisite jurisdiction for the Injunction. The Commission is a department of government of the Commonwealth of Virginia, established and empowered by constitutional and legislative fiat. *See* VA. CONST. ART. IX, §§ 1 and 2; VA. CODE ANN. §§ 12.1-12 and -13 (Michie 1993). The Commission is vested with legislative, executive, and judicial powers, and is the conduit by which the Commonwealth exercises its police power to regulate corporations doing business within the Commonwealth. *See, e.g., Prentis v. Atlantic C. L. Co.*, 211 U.S. 210, 224 (1908); *Winchester & S. R. Co. v. Commonwealth*, 55 S.E. 692, 693 (Va. 1906). When exercising its judicial powers, the Commission sits as a court of record possessing subject matter jurisdiction over the regulation of risk retention groups doing business in Virginia pursuant to Title 38.2, Chapter 51, of the Virginia Code. Included within this grant of jurisdiction is the power to conduct hearings, impose penalties for violations of Title 38.2, issue orders, and revoke a risk retention group's authority to do business in Virginia. *See* VA. CODE ANN. §§ 38.2-5100 and -5111 (Michie 1994). In addition to the powers and authority conferred upon Virginia courts by general law, the Commission also has the power to impose and enforce any penalty, civil or otherwise, against any person who violates any provision of the Virginia Insurance Code. VA. CODE ANN. § 38.2-220 (Michie 1994).

B. Proceedings Below

Where a risk retention group is found to be impaired, a state may require that it comply with an injunction issued by a "court of competent jurisdiction." 15 U.S.C. § 3902(a)(1)(H) (West Supp. 1994). The Risk Retention Act further provides that "nothing in [section 3902] shall be construed to affect the authority of any Federal or State court to enjoin" the sale of insurance or operation by a risk retention group that is financially impaired. 15 U.S.C. § 3902(e)(2). After hearing testimony, receiving evidence, and entertaining arguments of counsel, the Commission found that Respondent was financially impaired and issued the Injunction which partially enjoined Respondent from writing any new insurance business in the Commonwealth of Virginia. (App., *infra*, at 47a-48a).

Thereafter, Respondent perfected an appeal of the Injunction to the Virginia Supreme Court. During the pendency of this appeal, Respondent filed an action in the Federal Court also seeking relief from the Injunction. Before the Virginia Supreme Court and before the Federal Court, Respondent alleged, *inter alia*, that Petitioner was not a "court of competent jurisdiction" as the phrase is used in the Risk Retention Act.

The Federal Court noted that the Risk Retention Act does not define the phrase "court of competent jurisdiction" and that there do not appear to be any reported cases defining the phrase within the meaning of the Act. (*Id.* at 33a). Relying on this Court's decision in *Park N' Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) (statutory analysis begins "with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose"), the Federal Court found that the phrase should be given its ordinary meaning. Relying upon this Court's decision in *United States v. Morton*, 467 U.S. 822, 828 nn.6-7 (1984), the Federal Court noted that the phrase "court of competent jurisdiction" normally refers to courts having subject matter jurisdiction. The Federal Court then noted that the

Commission's subject matter jurisdiction "extends to issues of state-wide concern". (App., *infra*, at 33a (quoting *Atlas Underwriters, Ltd. v. State Corporation Comm'n*, 375 S.E.2d 733, 734 (Va. 1989)). Finally, the Federal Court noted that the Commission has specific regulatory jurisdiction over risk retention groups pursuant to Virginia Code sections 38.2-5110 *et seq.* (App., *infra*, at 34a). The Federal Court then considered whether the Commission is a court. Relying on this Court's decisions in *Roudebush v. Hartke*, 405 U.S. 15, 21 (1972) and *Hill v. Martin*, 296 U.S. 393, 397-98 (1935), the Federal Court found it "apparent that Congress expected this determination to be made by reference to state law, for it is state law that typically defines a 'state court of competent jurisdiction'". (App., *infra*, at 34a). Relying on decisions from this Court, the Virginia Supreme Court, and other courts, the Federal Court found that, under Virginia law, it is well-settled that the Commission may function as a court. (*Id.* at 34a (citing *Prentis v. Atlantic C. L. Co.*, 211 U.S. 210, 224 (1908); *Atlas Underwriters, Ltd. v. State Corp. Comm'n*, 375 S.E.2d 733, 734 (Va. 1989); *Virginia Nat'l Bank v. Virginia*, 320 F. Supp. 260, 262 (E.D. Va. 1970), *appeal dismissed*, 448 F.2d 425 (4th Cir. 1971)). On December 3, 1993, the Federal Court decided that:

> unquestionably, then, the SCC may function as a 'court of competent jurisdiction' within the meaning of the Act.

(App., *infra*, at 35a).

Approximately six months later, a majority of the Virginia Supreme Court (the "Majority"), addressed the precise federal question previously decided by the Federal Court and found the statutory phrase "court of competent jurisdiction" to be ambiguous. Relying on this Court's decision in *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 23-24 (1982), the majority considered the Risk Retention Act's legislative history, though no statutory ambiguity could be identified without reference to such history. (App., *infra*, at 8a-

10a). Next, the Majority relied on this Court's decisions in *Rice v. Rehner*, 463 U.S. 713, 728 (1983) and *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) in considering the interpretation of the Risk Retention Act's sponsor. (App., *infra*, at 10a). Based on a review of the legislative history and the statements by the Risk Retention Act's sponsor, the court reasoned that "Congress intended that a 'court of competent jurisdiction' be 'an independent judicial officer'". (*Id.*). Finally, the Majority reasoned that "[i]n contrast to the constitutional and statutory framework in which proceedings under state law are conducted and decided," Congress required something more of state courts under the Risk Retention Act. (*Id.* at 11a).

Justice Lacy, with whom Chief Justice Carrico and Justice Whiting joined, dissented from the Majority's conclusion that the Commission was not a court of competent jurisdiction within the meaning of the Risk Retention Act. (App., *infra*, at 12a-16a). In such dissent, these justices noted the Majority's disregard for the Federal Court decision, and agreed with the Federal Court's rejection of "the same position" Respondent raised before the Virginia Supreme Court. (*Id.*). The dissenting opinion, relying on this Court's reasoning in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), noted that "[i]t is well-settled that legislatures use words or expressions in their commonly understood meaning, unless a contrary intent is expressed." (*Id.* at 13a). The dissenting opinion also observed that, based on prior cases of the Virginia Supreme Court and the statutes and Constitution of Virginia, "there can be no dispute that the Commission can operate as a 'court'. The Commission, therefore qualifies as a 'court of competent jurisdiction' under the usually understood sense of the phrase." (*Id.*). The dissenting opinion noted that:

> The majority's conclusion is based on its definition of "independent judicial officer" as a structural separation between the entity issuing the injunction and the insurance commissioner. This definition is not found in either instance the phrase appears in the

> legislative history. 132 Cong. Rec. 16,777; 29,090. The phrase was not addressed or discussed by the Bill's sponsor or in the Senate report.

(*Id.* at 16a). After analyzing the Risk Retention Act and its legislative history, Justice Lacy stated that neither the statute itself nor the legislative history supported the Majority's construction of the Risk Retention Act. (*Id.*).

In its Petition for Rehearing, the Commission emphasized its concern that, under settled principles of issue preclusion, Respondent was barred from presenting the issue of whether the Commission was a court of competent jurisdiction under the Risk Retention Act in light of the Federal Court decision. (App., *infra*, at 59a-60a). Additionally, the Commission argued that the Risk Retention Act, as construed by the Virginia Supreme Court, violates the Tenth Amendment. (App., *infra*, at 64a-66a). In a one-sentence order, the Virginia Supreme Court denied the Commission's Petition for Rehearing. (App., *infra*, at 49a).

During the pendency of Respondent's appeal to the Virginia Supreme Court, Respondent also filed an appeal (the "Federal Appeal") of the Federal Court decision with the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit"). The Federal Appeal was placed in abeyance pending a decision by the Virginia Supreme Court in this matter. After the Virginia Supreme Court's decision was rendered, Respondent filed a Motion to Remand with Instructions to Vacate in the Federal Appeal arguing that the decision by the Virginia Supreme Court made the Federal Appeal moot. On October 13, 1994, the Fourth Circuit entered its Order remanding the case to the Federal Court with instructions to dismiss the case as moot. (App., *infra*, 89a - 90a.)

C. Federal Questions Presented to the Virginia Supreme Court.

The federal questions presented here were properly raised before the Virginia Supreme Court. In its initial brief to that Court, the Commission urged the dispositive effect of the Federal Court's decision that the Commission is a court of competent jurisdiction. Specifically, the Commission stated that the Federal Court's holding that the Commission was unquestionably a court of competent jurisdiction disposed of Respondent's first assignment of error to the Virginia Supreme Court. Commission's Brief at 12. While the Commission did not specifically mention either claim preclusion or issue preclusion, this Court's "jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). Thus, this Court has jurisdiction over this case. Indeed, as this Court has stated:

> provisions declaring the supremacy of the Constitution and the extent of judicial power . . . confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts.

Stoll v. Gottlieb, 305 U.S. 165, 167 (1938).

Even if the federal questions were deemed to have been raised for the first time in the Petition for Rehearing, this Court would have jurisdiction to review the decision from the Virginia Supreme Court. Assuming that there is a procedural bar in Virginia against raising questions for the first time in a petition for rehearing, the Virginia Supreme Court has recognized an exception to this bar for the presentation of constitutional questions first raised in a petition for rehearing. *See Trust Co. v. Commonwealth*, 145 S.E. 326, 327 (Va. 1928) (where the Court considered an issue precisely because it fell within such an exception), *rev'd sub nom. Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929). Thus, neither of the questions presented here comes within any purported procedural bar under Virginia law.

Moreover, "a state procedural ground is not adequate unless the procedure is strictly or regularly followed . . . state courts may not avoid deciding federal issues by invoking procedural rules they do not apply evenhandedly to all similar claims." *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982). Assuming that such a procedural bar exists in Virginia, the Virginia Supreme Court does not consistently apply it. *See, e.g., Petrus v. Robbins*, 83 S.E.2d 408, 414-17 (Va. 1954) (Spratley, J., dissenting). Thus, even if certain questions were presented for the first time in the Commission's Petition for Rehearing, this is of no moment under this Court's decision in *Hathorn v. Lovorn*.

REASONS FOR GRANTING THE PETITION

The Virginia Supreme Court, in conflict with this Court's well-settled jurisprudence, failed to give any preclusive effect to the Federal Court's judgment and redecided the exact federal question already decided by the Federal Court. Moreover, the Virginia Supreme Court's decision below is erroneous because (i) that court has improperly based the disruption of the usual balance of federal and state powers on the grounds of ambiguity rather than on any plain or clear statement by Congress that such disruption was intended, and (ii) that court has unnecessarily interpreted a federal statute in a manner which produces a violation of the Tenth Amendment to the United States Constitution.

I. The Decision of the Virginia Supreme Court Casts Substantial Doubt not Only on the Enforceability of Certain Key Provisions of the Risk Retention Act, but More Fundamentally, on the Ability to Establish and Govern its Own Courts.

Under the Rules of this Court, one factor which may cause this Court to grant certiorari where it otherwise would not is where a state court decides a federal question in conflict with decisions of this Court. Sup. Ct. R. 10(c). This Court has previously reversed or vacated state court judgments which either

were contrary to this Court's decisions or misread this Court's precedent. *See, e.g., Powell v. Nevada*, __ U.S. __, 114 S. Ct. 1280 (1994) (vacating state court judgment which misread this Court's precedent); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (reversing state court judgment contrary to decision by this Court). This Court should do no less here where a state court of last resort has decided three substantial federal questions in direct conflict with this Court's jurisprudence. Indeed, this case presents an uncanny twist of federalism principles; to wit: a state court has, under the United States Constitution and this Court's doctrines, improperly given no effect to the final judgment of a federal court and too great an effect to the limited powers of the federal legislature with respect to state courts.[1]

The Virginia Supreme Court has found in the Risk Retention Act an intention and, more fundamentally, an ability by Congress to impose federal conditions on the States' establishment of its judicial bodies. Such a substantial disruption of the powers reserved by the Constitution to the States should not have been presumed for two reasons: (1) there is no plain statement of such intention in the Risk Retention Act;[2] and (2) Congress may not do so under the Constitution and this Court's decisions. If such a construction were allowed to rest on the flimsy reed of ambiguity, this Court's plain statement jurisprudence would be seriously

---

[1] Specifically, the lower court's construction of the Risk Retention Act places federal regulatory requirements on the States regulating risk retention groups. Such federal regulation was never intended by Congress. *See Home Warranty Corp. v. Caldwell*, 777 F.2d 1455, 1487 & n.39 (11th Cir. 1985), *cert. denied*, 479 U.S. 852 (1986) (without deciding "whether Congress could require a state official to act as a surrogate federal insurance commissioner", concluding under the Risk Retention Act of 1981, that "no federal regulatory requirements are placed on the insurance commissioner (or the state agency)").

[2] As this Court has stated, no court should assume that Congress lightly exercises its powers to legislate under the Supremacy Clause of the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Virginia Supreme Court has erroneously done just that.

undermined here. Moreover, if Congress were granted such extraordinary powers, the ramifications on every State's establishment of its judiciary -- a power reserved to the States since the early days of this Nation -- would be disastrous.

By granting certiorari and either considering the merits of this matter or summarily reversing the Virginia Supreme Court's decision, this Court can correct these patent constitutional infractions. This Court should do so.

II. The Virginia Supreme Court's Failure to Give Deference to the Federal Court Decision, in Derogation of Settled Principles of Federalism, is in Direct Conflict with Established Jurisprudence of this Court.

The Federal Court decided that:

> Unquestionably, then, the SCC may function as a "court of competent jurisdiction" within the meaning of the Act.

(App., *infra*, 35a).

Approximately six months thereafter, the Virginia Supreme Court decided that:

> we hold, that for purposes of the Act only, the Commission, as a regulatory tribunal, is neither an "independent judicial officer" nor a court of competent jurisdiction as contemplated by Congress.

(App., *infra*, at 11a). As this Court has observed, "[i]t is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll*, 305 U.S. at 173. The litigation of the question presented to the Federal Court should have ended when that court decided this question. Instead, the

Virginia Supreme Court allowed it to continue and forced the Commission to litigate the same question twice.

"State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law." *Heck v. Humphrey*, __ U.S. __, __, 114 S. Ct. 2364, 2373 (1994). Under well-settled federal law, the pendency of an appeal does not diminish the preclusive effect of a judgment rendered by a federal court. *See, e.g., Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188-89 (1941) (in federal courts, general rule long recognized that appeal does not detract from judgment's decisiveness and finality) (citing *Deposit Bank v. Frankfort*, 191 U.S. 499, 520 (1903)).

In *Stoll v. Gottlieb*, 305 U.S. 165 (1938), this Court considered the propriety of a state court's denial of preclusive effect to a bankruptcy court's decision. There, this Court specifically found that, even if the federal court had decided a question erroneously, "its determination of that matter was conclusive upon the parties before it, and could not be questioned by them. . . ." 305 U.S. at 175. In the case at bar, the question of whether the Commission may be a court of competent jurisdiction under the Risk Retention Act was settled by the Federal Court. Under the explicit teachings of this Court, it was improper for Respondent to raise, and for the Virginia Supreme Court to reconsider, this issue. *See, e.g., Stoll v. Gottlieb*, 305 U.S. at 165 (1938); *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903); *Crescent City Live-Stock Landing and Slaughter-House Co. v. Butchers' Union Slaughter-House and Live-Stock Landing Co.*, 120 U.S. 141 (1887). Just as this Court reversed the decision of the Supreme Court of Illinois in *Stoll*, so must it now reverse the decision by the Virginia Supreme Court. "Any other conclusion strikes down the very foundation of the doctrine of res judicata. . . ." *Deposit Bank*, 191 U.S. at 520. In light of this well-established law, it is "unthinkable to suggest that state courts should be free to disregard the judgments of federal courts." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H.

COOPER, FEDERAL PRACTICE and PROCEDURE § 4468 (1981). Here, the unthinkable has occurred.

Because the majority of the lower court has disregarded the decision of the Federal Court, in direct conflict with this Court's settled jurisprudence, this Court should grant the Writ of Certiorari and either consider the merits of this matter or summarily reverse the Virginia Supreme Court's decision.

III. The Virginia Supreme Court's Construction of the Risk Retention Act is Contrary to this Court's "Plain Statement" Jurisprudence and Causes the Risk Retention Act to Violate the Tenth Amendment to the United States Constitution.

A. Any Intention by Congress to Disrupt the Constitutional Balance of Power between State and Federal Governments must be Clear on the Face of the Statute and May Not Rest on Mere Ambiguity.

Under the Tenth Amendment, the powers not delegated to the United States or prohibited to the states are reserved to the states or to the people. As this Court noted as early as 1798,

> establishing courts of justice, the appointment of Judges, and the making regulations for the administration of justice, within each State, according to its laws, on all subjects not entrusted to the Federal Government, appears to me to be the peculiar and exclusive province, and duty of the State Legislatures . . . .

Calder v. Bull, 3 U.S. 386, 387 (1798). Indeed, the power of a state to prescribe the qualifications of its own judicial officers "should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States."

Gregory v. Ashcroft, 501 U.S. at 460. A more fundamental intrusion into state sovereignty is present here than was considered in *Gregory v. Ashcroft*. Under the lower court's decision, Congress has established and imposed a federal framework on the States' judiciary system in the context of the States' regulation of financially troubled risk retention groups. There is simply no plain provision in the United States Constitution which would allow Congress to dictate to the states the structure and function of its judicial bodies. Thus, the lower court's construction of the relevant provisions of the Risk Retention Act, to the extent that it finds a Congressional intent to dictate to the states certain requirements regarding its judicial system, prompts serious constitutional questions. This Court can, however, avoid the potential constitutional problem by applying the plain statement rule. *See, e.g., Gregory v. Ashcroft*, 501 U.S. at 460-465. The direct applicability of the *Gregory v. Ashcroft* plain statement rule to the case at bar is made clear by a recent discussion of that decision by Justice Scalia:

> in *Gregory v. Ashcroft*, . . .we said that unless it was clear that the term "appointee[s] on the policymaking level" did not include judges we would construe it to include them, since the contrary construction would cause the statute to intrude upon the structure of state government, establishing a federal qualification for state judicial office. Such intrusion, we said, requires a "plain statement" before we will acknowledge it.

Chisom v. Roemer, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting).

Under the plain statement rule, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language in the statute." *Gregory v. Ashcroft*, 501 U.S. at 460. Indeed, Congress should make its intention clear and

manifest if it intends to pre-empt the historic balance of federal and state powers. *Id.* One of the tenets on which the plain statement rule stands is that no court should assume that Congress lightly exercises its powers to legislate under the Supremacy Clause of the Constitution. *Id.* (citing U.S. Const. art. VI.) Indeed, the "plain statement rule" merely acknowledges that "the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.*

Just last term, this Court stated that, when Congress intends to displace traditional state regulation, this federal purpose must be "clear and manifest." *BFP v. Resolution Trust Corp.*, _ U.S. __, __, 114 S. Ct. 1757, 1765 (1994). Where such Congressional intent is doubtful, "our federal system demands deference to long-established traditions of state regulation." *Id.* at __, 114 S. Ct. at 1765-66.

In essence, the Virginia Supreme Court, based on what it found to be an ambiguity,[3] determined that Congress had placed federal conditions on Virginia's establishment of its judicial tribunals in the context of regulating a risk retention group. As this Court has noted, "to give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which [this Court has] relied to protect states' interests." *Gregory v. Ashcroft*, 501 U.S. at 465. In fact, this Court has specifically stated that even if a statute is ambiguous, it will not attribute to Congress any intention of intruding on state governmental functions. *Id.* at __, 111 S. Ct. at 2406. Similarly, the Virginia Supreme Court should not have

---

[3] Petitioner argued (*see* Brief of State Corporation Commission to Virginia Supreme Court at 22; App., *infra*, at 61a) and the Federal Court, relying on this Court's decisions concerning statutory construction, (App., *infra* at 33a), found that the phrase "court of competent jurisdiction" was intended by Congress to have its plain and ordinary meaning. Nonetheless, the Virginia Supreme Court simply noted that the Risk Retention Act does not define the phrase and summarily stated that the phrase was ambiguous. (App., *infra*, at 8a).

found such intrusion by Congress based merely on some purported ambiguity in the Risk Retention Act.

Upon application of the plain statement rule, it becomes apparent that the lower court has incorrectly read into the Risk Retention Act an intention by Congress to impose requirements on Virginia's judicial officers in contrast to those contemplated under the Virginia constitutional and statutory framework. Thus, this Court should grant the Writ of Certiorari and either review the merits of this case or summarily reverse the lower court's decision.

B. As Construed by the Virginia Supreme Court, the Questioned Provisions of the Risk Retention Act Violate the Tenth Amendment.

This case is not one where Congress has subjected a State to the same legislation applicable to private parties. *New York v. United States*, __ U.S. __, __, 112 S. Ct. 2408, 2420 (1992). Rather, this matter involves the circumstances under which Congress may direct or motivate the State to regulate risk retention groups in a particular fashion. *Id.*[4] Specifically, the question here is whether Congress may impose on the States federal requirements in establishing regulatory tribunals in each state. This Court has noted that the Framers of the Constitution "explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states." *New York v. United States* at __, 112 S. Ct. at 2423. Accordingly, under this Court's decision in *New York v. United States*, Congress may not regulate the States in the manner in which the lower court's decision would allow.

---

[4] Thus, the "unsteady path" referenced in *New York v. United States* need not be trod here. *See id.* (comparing, *inter alia*, *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

This Court recently noted that "the authority of the people of the States to determine the qualifications of their government officials may be inviolate." *Gregory v. Ashcroft*, 501 U.S. at 453. Under the Virginia Supreme Court's construction of the Risk Retention Act, Congress has violated an even more basic aspect of state sovereignty by placing federal requirements on state tribunals in the context of regulating risk retention groups. This Court's decision in *New York v. United States*, __ U.S. __, 112 S. Ct. 2408 (1992) reveals why Congress may not do so under the Tenth Amendment. In that case, this Court considered whether Congress could direct or otherwise motivate states to regulate in a particular manner. *Id.* at __, 112 S. Ct. at 2420. There, it was said that:

> [w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

New York v. United States, __ U.S. __, __, 112 S. Ct. at 2421 (1992). Neither may the Constitution be read to grant Congress the power to impose federal conditions on the framework of the States' judiciary system.

Under the Virginia Supreme Court's improper construction of the Risk Retention Act, Congress intended to place federal qualifications on state judicial bodies "[i]n contrast to the constitutional and statutory framework in which proceedings under state law are conducted and decided,..." (App., *infra*, at 11a). As was true in *New York v. United States*, the Constitution simply does not empower Congress to subject state governments to this type of direction. _U.S. at __, 112 S. Ct. at 2428. Consequently, the provisions of the Risk Retention Act in question, as interpreted by the lower court, are unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari and either consider the merits of this matter or summarily reverse the Virginia Supreme Court's decision.

Respectfully submitted,

The State Corporation
Commission of the
Commonwealth of Virginia

By Counsel

Cantilo, Maisel & Hubbard, L.L.P.

Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins
Suite 1700
111 Congress Avenue
Austin, Texas 78701
(512) 478-6000
(512) 404-6550 (Telecopier)

Counsel for Petitioner

Of Counsel:
Stewart E. Farrar
Solicitor General
State Corporation Commission
Anthony Gambardella
General Counsel
Peter B. Smith
Senior Counsel

Michael D. Thomas
Assistant General Counsel
State Corporation Commission
Office of General Counsel
P. O. Box 1197
Richmond, Virginia 23209

October 1994

CERTIFICATE OF SERVICE

I, Patrick H. Cantilo, a member of the bar of this Court, hereby certify that on this 28th day of October, 1994, three copies of the Petition for Writ of Certiorari in the captioned matter were mailed, first class postage prepaid, to each of the following persons:

Harvey B. Cohen, Esquire
Cohen, Gettings, Dunham & Harrison, P.C.
Suite 800
2200 Wilson Blvd.
Arlington, Virginia 22101

Drew S. Days, III, Esquire
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

Patrick H. Cantilo
Patrick H. Cantilo
Cantilo, Maisel & Hubbard, L.L.P.
111 Congress Avenue, Suite 1700
Austin, Texas 78701

Supreme Court, U.S.
FILED

94 883 OCT 28 1994

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

Commonwealth of Virginia,
at the Relation of
The State Corporation Commission, *Petitioner*,
v.
National Home Insurance Company,
(a Risk Retention Group), *Respondent*.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
Stewart E. Farrar
Solicitor General of the
State Corporation Commission
Anthony Gambardella
General Counsel
Peter B. Smith
Senior Counsel
Michael D. Thomas
Assistant General Counsel
State Corporation Commission
Office of General Counsel
P.O. Box 1197
Richmond, Virginia 23209

Patrick H. Cantilo
Counsel of Record

Randolph N. Wisener
Steven E. Adkins
Cantilo, Maisel & Hubbard, L.L.P.
Suite 1700
111 Congress Avenue
Austin, Texas 78701
(512) 478-6000
(512) 404-6550 (Telecopier)

Counsel for Petitioner

October, 1994

91 pp

Present: All the Justices

NATIONAL HOME INSURANCE COMPANY
(A RISK RETENTION GROUP)
v. Record No. 931052

OPINION BY JUSTICE
LEROY R. HASSELL
June 10, 1994

COMMONWEALTH OF VIRGINIA,
AT THE RELATION OF THE
STATE CORPORATION COMMISSION

FROM THE STATE CORPORATION COMMISSION

The primary issue that we consider in this appeal is whether the State Corporation Commission is a court of competent jurisdiction within the meaning of the Federal Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901 through 3906.

I.

National Home Insurance Company (NHIC) is a risk retention group created in accordance with the Product Liability Risk Retention Act of 1981 that was amended by the Liability Risk Retention Act of 1986 (The Act). A risk retention group is a legal entity organized for the primary purpose of spreading the risk of liability exposure among its members. See 15 U.S.C. § 3901(a)(4)(A) through (C).

NHIC is chartered and licensed by the State of Colorado and issues liability insurance coverage to residential home builders. NHIC conducts business in 48 states and the District of Columbia.

The builders are required to be members of the Home Buyers Warranty Program that is administered in Virginia by the Home Buyers Warranty Corporation II. NHIC is one of several companies that belong to the "family" of Home Buyers Warranty

corporations. These corporations provide administrative, management, marketing, underwriting, and warranty services related to the insurance sold to residential builders.

NHIC insures its builder members against claims made by homeowners for losses caused by defects in construction and workmanship in homes constructed by builder members. The builder members are the insured parties under the warranties and the individual home owners are the beneficiaries.

In preparing NHIC's audited financial statements for the year-end 1991, Coopers & Lybrand, an accounting firm, discovered that NHIC had failed to collect sufficient premiums from the policies it had sold to pay for claims made. Accordingly, Coopers & Lybrand's staff found, and two other accounting firms retained later by NHIC confirmed, that NHIC's deficit in unearned premium reserves constituted a liability of $9,626,381. This additional liability reduced NHIC's policyholder surplus to a negative $16,918,955 as of December 31, 1991. NHIC is required to maintain a positive surplus of at least $1,050,000 in accordance with Colorado's minimum surplus requirement.

Coopers & Lybrand stated, in its 1991 audit report submitted to NHIC's board of directors, that there is "substantial doubt about [NHIC's] ability to continue as a going concern" because of the large premium deficiency. NHIC reported the deficit in unearned premium reserves to the Colorado Division of Insurance, and it made a determination of delinquency and entered an order of direct supervision against NHIC.

The Colorado Division of Insurance entered an order of summary suspension, finding that NHIC was operating in "an impaired and/or insolvent financial condition," which was "a result of [NHIC's] deliberate and willful failure to comply with Colorado law." Subsequently, the Colorado Division of Insurance issued an order requiring that NHIC immediately cease and desist from the further transaction of the business of insurance unless it complied with certain conditions designed to restore NHIC's surplus over a

period of time. This order permits NHIC to continue issuing new insurance contracts to builder members even though it is "financially impaired and/or insolvent."

In March 1993, the Virginia Bureau of Insurance received NHIC's 1992 annual statement that reflected the negative surplus. Shortly thereafter, the Bureau of Insurance filed pleadings with the Clerk of the State Corporation Commission, requesting that the Commission enjoin NHIC from issuing any new certificates or other evidences of insurance coverage until NHIC restored its surplus to the minimum amount required by Colorado. NHIC filed responsive pleadings in which it, among other things, denied that it was in a hazardous financial condition.

The Bureau of Insurance and NHIC filed numerous memoranda of law. The Commission conducted an evidentiary hearing and considered memoranda of law and argument of counsel. The Commission enjoined NHIC from issuing, with certain exceptions, any new policies of insurance or other coverages in Virginia until NHIC restores its surplus to the minimum monetary amount required by Colorado law. NHIC appeals the final order of the Commission to this Court. Va. Const. art. IX, § 4; Code § 12.1-39.

II.

NHIC asserts that the Liability Risk Retention Act preempts Virginia's power to regulate retention groups, and that the Commission's actions are not authorized by the narrow exceptions contained in the Act. The Commission asserts that the Act does not completely preempt state authority and that its actions were authorized.

Section 3902(a) of the Act exempts risk retention groups from certain state laws, rules, regulations, or orders. However, this exemption does not completely divest a state of power to regulate the activities of risk retention groups. Sections 3902(a)(1)(A) through (H) create numerous exceptions to the

general exemption contained in § 3902(a). For example, states are permitted to require risk retention groups to: comply with the requirements of the unfair claim settlement practices law of the state, 15 U.S.C. § 3902(a)(1)(A); pay, on a nondiscriminatory basis, premium and other taxes levied on admitted insurers and surplus lines insurers, brokers, or policy holders, 15 U.S.C. § 3902(a)(1)(B); participate, on a nondiscriminatory basis, in mechanisms established or authorized under state law for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanisms, 15 U.S.C. § 3902(a)(1)(C); and register with and designate the state insurance commissioner as its agent for the purpose of receiving service of legal documents or process, 15 U.S.C. § 3902(a)(1)(D).

Specifically, § 3902(a) of the Act, which governs our resolution of this appeal, states in relevant part:

> Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would--
>
> > (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group exept [sic] that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any State may require such a group to--
> >
> > . . . .
> >
> > (E) submit to an examination by the State insurance commissioners in any State in which the group is doing business to determine the group's financial condition, if--

(i) the commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group; and

(ii) any such examination shall be coordinated to avoid unjustified duplication and unjustified repetition;

(F) comply with a lawful order issued--

(i) in a delinquency proceeding commenced by the State insurance commissioner if there has been a finding of financial impairment under subparagraph (E); or

(ii) in a voluntary dissolution proceeding;

(G) comply with any State law regarding deceptive, false, or fraudulent acts or practices, except that if the State seeks an injunction regarding the conduct described in this subparagraph, such injunction must be obtained from a court of competent jurisdiction;

(H) comply with an injunction issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired.

Additionally, § 3902(d) specifically requires that risk retention groups submit certain information to state insurance commissioners:

> Each risk retention group shall submit--
>
> . . . .
>
> (2) to the insurance commissioner of each State in which it intends to do business, before it may offer insurance in such State--
>
> (A) a copy of such plan or study (which shall include the name of the State in which it is chartered and its principal place of business); and
>
> (B) a copy of any revisions to such plan or study, as provided in paragraph (1)(B) (which shall include any change in the designation of the State in which it is chartered); and
>
> (3) to the insurance commissioner of each State in which it is doing business, a copy of the group's annual financial statement submitted to the State in which the group is chartered as an insurance company, which statement shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by--
>
> (A) a member of the American Academy of Actuaries, or
>
> (B) a qualified loss reserve specialist.

Section 3902(f)(1) states:

> Subject to the provisions of subsection (a)(1)(G) of this section (relating to injunctions) and paragraph (2), nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a risk retention group is not exempt under this chapter.

Thus, these provisions in § 3902 of the Act clearly indicate that Congress intended to reserve to the states an important role in the regulation of the financial activities of risk retention groups.

III.

NHIC argues that the Commission is not empowered to "conduct its own examination to determine [NHIC's] financial condition," except under limited circumstances that are not present here. The Commission, however, asserts that it did not conduct an "examination" within the meaning of the Act when it reviewed financial data that NHIC had filed with the Colorado Division of Insurance and other publicly available information. We agree with the Commission.

Even though § 3902(a)(1)(E) explicitly prohibits non-domiciliary states, like Virginia, from initiating a financial "examination" of risk retention groups unless the commissioner of the jurisdiction in which the group is chartered has declined to do so, we find no language in the Act which precludes Virginia's Commissioner of Insurance from reviewing information obtained as a result of the chartering state's financial examination. Here, Virginia's Commissioner of Insurance did not conduct a financial examination of NHIC. Rather, he merely reviewed the financial data that NHIC was required by the Act to submit to him, 15 U.S.C. § 3902(d), as well as financial data obtained from the Colorado Division of Insurance. Thus, we find no merit in NHIC's argument.

IV.

NHIC argues that the Commission's injunction order is invalid because "the Commission is not a 'court of competent jurisdiction' under the Risk Retention Act." NHIC, relying upon legislative history, argues that the phrase "court of competent jurisdiction" means an "independent judicial officer" and "[a]s the Commission is charged with executing insurance laws, it is not independent from the Commissioner of Insurance." The Commission, also relying upon legislative history, argues that it is a court of competent jurisdiction, and it acted in a judicial capacity when it granted the injunction that is challenged here.

The Act does not define the phrase "court of competent jurisdiction." We believe that in the context of the Act, the phrase is ambiguous and, therefore, consistent with established federal law, we must consider the legislative history to ascertain whether Congress intended that the phrase include a tribunal such as the Commission. Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, 457 U.S. 15, 23-24 (1982).

The term, "court of competent jurisdiction," first appears in the legislative history leading to the enactment of the 1986 Amendments to the Act, with the introduction of Senate Bill 2129. When the Senate Committee on Commerce, Science and Transportation reported on Bill 2129, the minority of the Committee stated that "[s]tate regulatory protection should also include the ability of a State insurance commissioner to proceed with an injunction in a court of competent jurisdiction should a hazardous financial condition or a financially impaired condition be found in a risk retention group." S. Rep. No. 294, 99th Cong., 2d Sess. 28 (1986).

When the Bill was considered by the entire Senate, an agreed amendment, number 2209, was appended to Senate Bill 2129. 132 Cong. Rec. 16,779 (1986). This revision marked the first appearance of subsection (H) of 15 U.S.C. § 3902(a)(1), the subsection at issue in this case. 132 Cong. Rec. 16,775. Also

appearing for the first time was a provision limiting what is now 15 U.S.C. § 3902(e)(2). The proposed limitations stated:

> Sec. 7.(a) For purposes of enforcing this Act, if the insurance commissioner of any State has reason to believe that a risk retention group or purchasing group has engaged or is engaging in conduct subject to State law under this Act or in conduct in violation of this Act in that State, the commissioner may make use of any of the powers permitted under the laws of such State regarding insurers admitted to do business in that State, except that if a commissioner seeks an injunction against a risk retention group or purchasing group because of conduct in violation of section 3(d) or section 4(d) of this Act, the commissioner shall obtain an order for scuh [sic] injunction from a Federal or State court of competent jurisdiction.

132 Cong. Rec. 16,776 (emphasis added).

The purpose of these amendments was stated as follows:

> [These] amendments are intended to clarify S. 2129 with respect to the authority of state insurance commissioners to oversee the operation of risk retention groups and purchasing groups established under the Risk Retention Act.

Id.

More importantly, it was further explained that:

> This will assure that any decision to prohibit a group from operating because of a violation of the Risk Retention Act will be made by an independent judicial officer. It is intended that court orders enjoining this conduct (including penalties

> for contempt for breach of an order) will be the sole remedy for any conduct described in section 3(d) or 4(d).

Id. at 16,777 (emphasis added).

A similar bill in the House of Representatives was tabled in favor of Senate Bill 2129, id. at 25,399, and, on October 6, 1986, the final version of Senate Bill 2129 was submitted to the Senate for final approval. Before the Bill's enactment, the Bill's sponsor explained to the Senate:

> [B]oth the Senate and the House bill provide that if a State insurance commissioner seeks to enjoin a group because of conduct constituting deceptive, false, or fraudulent acts or practices, any such injunction must be obtained from a court of competent jurisdiction. This will assure that any such decision to prohibit a group from operating will be made by an independent judicial officer.

Id. at 29,090 (emphasis added).

The interpretation of a statute by its sponsor is an authoritative guide to its construction. Rice v. Rehner, 463 U.S. 713, 728 (1983); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982). As this legislative history makes clear, Congress intended that a "court of competent jurisdiction" be "an independent judicial officer."

The Commission is empowered to regulate insurance in Virginia, Code § 38.2- 200, and pursuant to Code § 12.1-16, the Commission delegates certain duties and responsibilities to the Commissioner of Insurance, who is also an employee of the Commission and serves at its pleasure. Here, the Bureau of Insurance, a division of the Commission, sought the injunction. The hearing was conducted by the Commission, and its counsel

participated. Moreover, the Commission is a party in this appeal urging an affirmance of its actions and rulings.

In contrast to the constitutional and statutory framework in which proceedings under state law are conducted and decided, we believe that, in drafting the Act, Congress intended that there be an institutional separation between the state insurance commissioner and the decisional body considering the insurance commissioner's request for an injunction. Thus, we hold, that for purposes of the Act only, the Commission, as a regulatory tribunal, is neither an "independent judicial officer" nor a court of competent jurisdiction as contemplated by Congress.

V.

Accordingly, we will reverse the order appealed from, vacate the injunction, and dismiss the proceeding with leave to the Bureau of Insurance to request the issuance of an injunction in a court of competent jurisdiction if it be so advised.

Reversed and dismissed.

JUSTICE LACY, with whom CHIEF JUSTICE CARRICO and JUSTICE WHITING join, concurring in part and dissenting in part.

NATIONAL HOME INSURANCE COMPANY
(A RISK RETENTION GROUP)

v. Record No. 931052

COMMONWEALTH OF VIRGINIA,
AT THE RELATION OF THE
STATE CORPORATION COMMISSION

JUSTICE LACY, with whom CHIEF JUSTICE CARRICO and JUSTICE WHITING join, concurring in part and dissenting in part:

I concur with the majority in all respects except in the conclusion reached in Part IV of the opinion.

Prior to this appeal, National Home Insurance Company (NHIC) sought a temporary restraining order and preliminary injunction from the United States District Court for the Eastern District of Virginia to prevent the State Corporation Commission from enforcing its July 2, 1993 order enjoining NHIC from conducting any new or additional business in Virginia. NHIC asserted the same position it raises before this Court--that the Commission's order was invalid because the Commission is not a "court of competent jurisdiction" under § 3902(a)(1)(G) of the Product Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901 through 3906 (the Act). National Home Ins. Co. v. State Corporation Commission, 838 F.Supp. 1104 (E.D. Va. 1993).

In rejecting NHIC's position, the District Court found that the phrase "court of competent jurisdiction" "normally refers to courts having subject matter jurisdiction." Id. at 1114. And, because the Act does not define the phrase, "it seems apparent that Congress expected this determination to be made by reference to state law, for it is state law that typically defines a 'state court of competent jurisdiction.' " Id. Relying on the Virginia Constitution and statutes, and opinions of this Court, as well as opinions of other federal courts, the District Court noted that the Commission "may function as a court[,] . . . . is vested with judicial powers and duties[,] . . . . has a stature and dignity equal to that of a circuit court[,] . . . . has the power to issue temporary and

permanent injunctions, ... must afford all parties reasonable notice of proceedings, an opportunity to be heard, and the opportunity to present evidence[,]" and concluded that "[u]nquestionably, then, the SCC may function as a 'court of competent jurisdiction' within the meaning of the Act." Id. at 1114-15.

The District Court also rejected NHIC's argument that the Act requires the "court of competent jurisdiction" to be independent of the state body responsible for insurance regulation, not only because there was no ambiguity in the phrase, but also because the terms of the Act do not contain such a requirement and there is no "compelling or persuasive reason to read this extra requirement into the Act's text." Id. at 1115 n.26.

Having failed to persuade the federal court, NHIC came to this Court repeating its arguments. Although the majority does not address the federal court decision, I believe the District Court construed the federal statute correctly, and, like the federal court, would reject NHIC's position.

The first matter for consideration is whether the language in the statute is ambiguous. It is a well-settled principle that legislatures use words or expressions in their commonly understood meaning, unless a contrary intent is expressed. American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). Like the District Court, I do not find the phrase "court of competent jurisdiction" contained in the Act to be ambiguous. This phrase, while not defined by the Act, is a phrase used frequently in both state and federal legislation apparently without confusion. As noted by the District Court, the phrase is applied by looking to the state law to identify the judicial body given jurisdiction over the subject matter in issue. The majority here did just that and, despite their conclusion that the phrase is ambiguous, had no trouble in determining that jurisdiction over this subject matter resides in the Commission. In addition, based on our prior cases, as well as the statutes and the Constitution of Virginia, there can be no dispute that the Commission can operate as a "court." The Commission, therefore qualifies as a "court of competent jurisdiction" under the usually understood sense of the phrase.

The body defined by state law as the court with competent jurisdiction is easily ascertainable in this case and no one disputes the Commission's subject matter jurisdiction. The majority for some reason, however, determines that the phrase in this statute is not clear and in fact means something different. I cannot subscribe to the view that Congress, in this Act, used the phrase "court of competent jurisdiction" in any unusual way or that Congress meant to usurp the authority of the states to prescribe subject matter jurisdiction for their tribunals.

Assuming for the moment that legislative history must be consulted to determine the meaning of a court of competent jurisdiction, I disagree with the majority's interpretation and application of that history. In my view, Congress sought to remove the ultimate decision-making authority regarding continued operation of a risk retention group from the state insurance commissioner and to place that authority in an entity with judicial powers. The reason for this specific provision is that in many jurisdictions, state law gives the insurance commissioner the authority to issue ex parte injunctions or cease and desist orders against insurance companies under certain circumstances.

The relevant legislative history supports this view. In 1986, Senator Kasten introduced Bill S. 2129 which amended the Act. When reported out of the Senate Committee, Bill S. 2129 specifically recognized the authority of any State to enjoin a "risk retention group that is in hazardous financial condition" from operating, or soliciting or selling insurance. (S. Rep. No. 294, 99th Cong., 2d Sess. 21-22 (1986)). Accordingly, where authorized by state law, the Bill continued to allow a state insurance commissioner to issue an ex parte injunction against a risk retention group that was in hazardous financial condition.

When Bill S. 2129 reached the full Senate, an amendment in the nature of a substitute was offered. This substitute contained the language requiring that any injunction be obtained from a court of competent jurisdiction.

> Sec. 7(a) For purposes of enforcing this Act, if the insurance commissioner of any State has reason to believe that a risk retention group or purchasing

> group has engaged in or is engaging in conduct subject to State law under this Act or in conduct in violation of this Act in that State, the commissioner may make use of any of the powers permitted under the laws of such State regarding insurers admitted to do business in that State, except that if a commissioner seeks an injunction against a risk retention group or purchasing group because of conduct in violation of section 3(d) or section 4(d) of this Act, the commissioner shall obtain an order for such injunction from a Federal or State court of competent jurisdiction.

132 Cong. Rec. 16,776 (emphasis added).

Analysis of the structure of this section is instructive. First, the section authorized state insurance commissioners to enforce the provisions of the Act by using "any of the powers permitted" under state law. But then a specific exception is made to this grant of enforcement power when "a commissioner seeks an injunction." At that point, the commissioner must go to a court of competent jurisdiction.

The written explanation for the substitute, inserted in the Congressional Record, apparently by the author of the substitute, stated that the substitute was "intended to clarify S. 2129 with respect to the authority of state insurance commissioners." Id. It is the independent authority of state insurance commissioners to issue cease and desist or injunction orders which the Congress sought to preclude. In Virginia, of course, the Insurance Commissioner has no authority to issue such an ex parte injunction, but must file a proceeding with the Commission. The majority's analysis of the legislative history fails to consider these significant circumstances in its interpretation of the legislative history. I do not believe and I cannot read the legislative history as evidencing an intent on the part of Congress to vitiate the Commonwealth's statutory scheme that vests subject matter jurisdiction in the Commission, a scheme that does not permit the activity Congress sought to curtail.

The majority's conclusion is based on its definition of "independent judicial officer" as a structural separation between the entity issuing the injunction and the insurance commissioner. This definition is not found in either instance the phrase appears in the legislative history. 132 Cong. Rec. 16,777; 29,090. The phrase was not addressed or discussed by the Bill's sponsor or in the Senate report.

In my opinion, neither the Act nor the legislative history supports the conclusion reached by the majority on this issue. Accordingly, I would affirm the decision of the Commission.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NATIONAL HOME INSURANCE COMPANY, (A RISK RETENTION GROUP),	)	
and	)	
HOME BUYERS WARRANTY CORPORATION II,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 93-1006-A**
STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF VIRGINIA, et. al.,	)	
Defendants.	)	

MEMORANDUM OPINION

I.

On July 2, 1993, the Virginia State Corporation Commission ("SCC") issued an order enjoining National Home Insurance Company ("NHIC"), a Colorado-based risk retention group, from conducting any new or additional business in Virginia. NHIC then brought this action challenging the SCC's authority to issue the injunction. Specifically, NHIC argues that the SCC injunction is invalid because the Product Liability Risk Retention Act, 15 U.S.C. § 3901 et. seq., (hereinafter "federal Risk Retention Act" or "Act"), permits only a "court of competent jurisdiction" to issue orders enjoining risk retention groups, and the SCC does not fit this description.

This matter originally came before the Court on NHIC's motion for a Temporary Restraining Order ("TRO") and Preliminary Injunction. After two hearings, the Court denied NHIC's request for a TRO, finding that the requirements for a TRO were not met. To expedite resolution of this dispute, the Court, with the parties' concurrence and pursuant to Rule 65(a)(2), Fed. R. Civ. P., ordered that consideration of this matter on the merits be advanced and consolidated with the hearing on the motion for a preliminary injunction. The parties have agreed that the record is adequate to support a decision on the merits without further discovery or argument.

NHIC's motion for a TRO and preliminary injunction raises the novel question of whether the SCC is a "court of competent jurisdiction" under the federal Risk Retention Act. Addressing this question requires the Court to construe the Act, consider the extent to which it preempts state regulation of risk retention groups, and then consider whether any degree of abstention is appropriate in the circumstances.

II.

A risk retention group is a corporation or other limited liability entity organized for the primary purpose of spreading the risks of liability exposure among its group members. See 15 U.S.C. § 3901 (a)(4)(A)-(C) (1993); VA. CODE § 38.2-5101 (Supp. 1992). NHIC is a risk retention group domiciled in Colorado. As such, it is subject to a tripartite scheme of concurrent federal and state regulation. Federal regulation is provided by the federal Risk Retention Act.[1] Next, NHIC is regulated by Colorado, its domiciliary state, under Colo. Rev. Stat. § 10-3-1041-43 (1993). And finally, NHIC and other risk retention

[1] The Risk Retention Act was designed to help alleviate the liability insurance crisis which began in the late 1970's by increasing the availability of insurance and lowering premiums for small businesses. See City Cab Co. v. Edwards, 745 F.Supp. 757, 760 (D.Me. 1990); Cobert v. Home Owners Warranty Corp., 391 S.E.2d 263 (Va. 1990).

groups operating in Virginia are regulated pursuant to Va. Code §§ 38.2-5100 et. seq. (Supp. 1992).

NHIC insures residential home builder-members in forty-eight (48) states and the District of Columbia. It issues "warranties" or policies to cover the liability risks of these builders, namely claims for losses resulting from structural and workmanship defects in the construction of new residential housing. Builder-members are the insured party under the warranties, while individual homeowners are the beneficiaries.

From NHIC's organization in 1986 until 1992, the company's reserves were calculated and certified by a professional actuarial firm. In connection with the company's 1991 audit and for reasons not disclosed in this record, NHIC retained a second firm to review the company's financial condition. This second firm concluded that NHIC was under-reserved for unearned premiums. Yet a third firm performed an actuarial review and concurred with this finding.[2] NHIC reported the deficiency in unearned premium reserves to the Colorado Division of Insurance ("CDI"). On January 14, 1993, the CDI issued an ex parte Summary Suspension Order ("Order") placing NHIC under the CDI's direct supervision. This Order, as later modified, required NHIC to "cease and desist" from the further transaction of insurance such that (i) no new builders could become group members; (ii) no single risk or hazard covered by NHIC could exceed $200,000 and; (iii) builder-members slated for annual renewal of group

---

2 Notwithstanding these multiple reviews, there is some dispute over the proper accounting methodology to be used in assessing the financial condition of risk retention groups. See Hearing Minutes of 6/25/93 at 29, 11. 21-25. NHIC counsel noted the difficulty in reviewing NHIC's financial status, stating, "[t]here is no history out there to show how this kind of animal is supposed to work." Contributing to the problem is the fact that insurance actuarial models are often based on ten-year cycles. Since NHIC began operations in 1986, it has not yet been through a complete cycle. The Court need not reach this accounting methodology dispute in resolving the questions at bar.

membership would henceforth be considered only for quarterly approval.

On May 24, 1993, NHIC and the CDI entered into a Stipulated Agreement and Order that created a Plan of Abatement ("Plan"). The Plan continues CDI's direct supervision of NHIC.[3] To this end, a CDI direct supervisor was placed in NHIC headquarters and remains there today. All NHIC expenditures must be approved by this CDI supervisor. Also pursuant to the Plan, NHIC received an initial infusion of 2.5 million dollars ($2,500,000). Further, the company must meet additional positive surplus targets by December 31, 1993 and July 1, 1994. As part of the Plan's monitoring program, NHIC must provide the CDI with financial projections in September and December of 1993 and March, 1994, and must submit semi-annual and annual financial statements reflecting not only loss and loss adjustment expenses, but also unearned premium and deficiency reserves. The Plan permits NHIC to insure warranties, provided net premiums written in any one quarter do not exceed four million dollars ($4,000,000), and provided no single risk exceeds $750,000. Significantly, the limitations contained in the Plan apply to NHIC's operations nationwide, not just its operations in Colorado. Pursuant to the Plan, the CDI issued a one-year stay concerning a finding of "financial hazard"[4] at NHIC.[5]

---

[3] The pertinent Colorado statutory provision defines "direct supervision" as:

> the institution of control of an insurance company by order of the commissioner whereby one or more specifically enumerated acts shall be required of the company by order of the commissioner, or one or more specifically enumerated acts or decisions of the company shall not be permitted without prior written approval of the commissioner.

COLO. REV. STAT. § 10-3-402(3) (1993). A direct supervisor may take any steps necessary to preserve, protect, and recover an insurance company's assets while the company is under supervision. Id.

[4] While the phrase "financial hazard" is not defined in either the Plan or the Act, the parties concur in the view that the term is synonymous with

Rehabilitation of financially troubled risk retention groups is a major focus of Colorado's risk retention group regulations. To this end, Colorado's regulations contemplate remedial steps "with the purpose in mind that insurance companies committing or suffering a delinquency be rehabilitated where and whenever possible with no loss of public confidence in the companies." COLO. REV. STAT. § 10-3-401 (1993). Consistent with this, the Plan was drafted to effectuate NHIC's rehabilitation, and gives NHIC seven months, from May until December, 1993, to meet its first surplus target. In order to allow time for the Plan to operate, a number of states, including Maryland, Florida, and Illinois, have apparently either rescinded cease and desist orders against NHIC, or have refrained from issuing such orders.

Virginia, in contrast to Colorado, takes a more restrictive regulatory stance. Testimony at SCC hearings indicates that Virginia regulators were uncomfortable with Colorado's Plan. Indeed, one witness from the Virginia Bureau of Insurance ("Bureau") testified, "I guess I have a problem as a regulator plugging the hole in the Company by allowing the Company to put on new business and bring in new policyholders when the Company is statutorily insolvent and impaired." This

---

"financially hazardous condition," which the Act defines. See 15 U.S.C. § 3901 (a)(7) (1993).

5 The parties dispute the nature of the CDI's "stay." NHIC contends that the stay is currently in effect, and that under the stay, CDI has reserved judgment on a finding that NHIC is, or ever was, in a "financially hazardous condition." The SCC argues that CDI has already made such a finding, and that the stay can be triggered only by NHIC's compliance with the Plan. Hearing Minutes of 6/25/93 at 41, ll. 12-16. In the alternative, the SCC contends that even if the stay is currently in effect, it merely stays a specific finding of "financial hazard," such that any CDI finding of impairment or insolvency at NHIC remains in effect. The Court need not reach a determination on the exact nature of Colorado's stay in order to resolve the issues at bar.

Colorado-Virginia conflict in regulatory philosophy underlies much of the current controversy.

On April 9, 1993, the Bureau filed a motion seeking a ninety (90) day temporary injunction against certain NHIC activities in the state. On May 18, 1993 the Bureau amended its motion, and sought to enjoin NHIC from issuing any new or renewal policies or certificates, or altering coverage under existing documents, until NHIC restored its capital and surplus to the minimum levels required by Colorado. SCC hearings on the petition were scheduled. NHIC then filed a motion to dismiss the pending SCC action. First, NHIC argued that the federal Act preempted the SCC's ability to examine NHIC's financial condition. NHIC further argued that the SCC was not authorized to issue the requested injunction because it was not a "court of competent jurisdiction" within the meaning of the Act. The SCC, after denying NHIC's motion to dismiss, conducted a two-day hearing on the merits. At the close of hearing the SCC followed the Bureau's recommendations and issued an Order partially enjoining NHIC operations in Virginia until NHIC met Colorado's minimum surplus requirements.[6]

On July 8, 1993, NHIC filed a petition for suspension of the Order. NHIC also offered to post up to one million dollars ($1,000,000) in the form of a supersedeas bond.[7] The SCC denied this petition, and NHIC subsequently appealed the SCC Order to

---

[6] Specifically, the Order permitted NHIC to issue certificates of insurance only in cases where (i) NHIC received both notification of a housing start and a deposit premium by June 30, 1993, or (ii) a member-builder obtained a building permit before June 30, 1993, and NHIC received notification of the housing start prior to September 1, 1993.

[7] According to NHIC, the $1 million would be earmarked solely for Virginia claims, and is far in excess of the amount the company has ever paid out in Virginia claims. In 1992, NHIC paid out approximately $140,000.00 in claims in Virginia, while in 1991 it paid out some $480,000.00 for Virginia claims.

the Supreme Court of Virginia.[8] The Supreme Court, on recess during the month of August, did not immediately rule on NHIC's appeal. On August 2, 1993, while action was still pending in the Virginia Supreme Court, NHIC filed a motion for declaratory judgment in this Court.[9] The SCC responded by filing a motion to dismiss, stay, or abstain. On September 1, 1993, the Supreme Court of Virginia rejected NHIC's request for suspension of the SCC Order. One week later, NHIC filed additional pleadings with the SCC, seeking dissolution or, in the alternative, vacation of the Order. These additional pleadings before the SCC are apparently still pending. In addition, NHIC's appeal on the merits of the SCC Order is currently pending before the Supreme Court of Virginia.

III.

The preemptive thrust of the Risk Retention Act is pellucidly clear. Section 3902(a)(1) of the federal Act preempts "any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would--make unlawful, or regulate, directly or indirectly, the operation of a risk retention group. . . ." 15 U.S.C. § 3902 (a)(1) (1993). Thus, the Act's structure and language make clear that "[t]he express preemption of state law with respect to risk retention groups is expansive." City Cab Co. v. Edwards, 745 F. Supp. 757, 761 (D.Me.1990); see Swanco Ins. Co. v. Hager, 879 F.2d 353, 357 (8th Cir.1989), cert. denied, 493 U.S. 1057 (1990). Further confirmation of this appears in the Act's legislative history, which notes that preemption of state laws that inhibit the formation and continued operation of risk retention groups is "central" to the Risk Retention Act's objective of facilitating the development of risk retention groups. See Sen. Comm. on Commerce, Science, and Transportation, Risk

---

8 Appeals from any SCC final order are heard, in the first instance, by the Virginia Supreme Court. VA. CODE § 12.1-39 (1993).

9 This pleading was later amended to add the SCC Commissioners as defendants in their individual and official capacities, and to add a cause of action under 42 U.S.C. § 1983.

Retention Amendments of 1986, S. Rep. No. 294, 99th Cong., 2d Sess. 3 (1986) [hereinafter "S. Rep. No. 294"]; see also Fla. Dept. of Ins. v. National Amusement Purchasing Group Inc., 905 F.2d 361, 362 (11th Cir. 1990).

But the Act's preemption, though substantial, is by no means complete. Substantial regulatory roles remain for domiciliary and non-domiciliary states. The Act is a significant federal intervention into the realm of insurance, an area traditionally left to state regulation. See 132 Cong. Rec. H 9695 (daily ed. Oct. 9, 1986) (statement of Rep. Florio); see, e.g., Osborn v. Ozlin, 310 U.S. 53, 65-66 (1940). But however extensive the Act's preemptive effect may be, it does not entail extensive, day-to-day federal regulation of risk retention groups.[10] Indeed, Congress considered and rejected a comprehensive scheme of complete federal regulation of risk retention groups.[11] Ins. Co. of Pennsylvania v. Corcoran, 850 F.2d 88, 91 (2d. Cir. 1988)(citing H.R.Rep. No. 190, 97th Cong. 1st Sess. 6-7, reprinted in 1981 U.S. Code Cong. & Admin. News ("U.S.C.C.A.N.") 1432, 1435); see also Swanco, 879 F.2d at 357. Instead, the federal Act establishes a tripartite scheme for regulating risk retention groups. At the apex of the tripartite scheme, the Act establishes a federal framework within which domiciliary and non-domiciliary states may conduct day-to-day regulation of risk retention groups. To this end, the Act establishes various federal standards, including (i) definitions of

---

[10] It is well-settled that the mere existence of a comprehensive federal regulatory scheme such as 15 U.S.C. § 3901 et. seq. does not, by itself, imply complete federal preemption. See English v. Gen. Elec. Co., 496 U.S. 72 (1990) (employee's state law claim for intentional infliction of emotional distress allegedly suffered while working in nuclear power facility not preempted notwithstanding extensive federal regulation of nuclear safety).

[11] In early drafts of what eventually became the Risk Retention Act, the Department of Commerce was given direct regulatory authority over risk retention groups. Home Warranty Corp. v. Caldwell, 777 F.2d 1455, 1470-71 (11th Cir. 1985), cert. denied 479 U.S. 852 (1986). Such direct federal regulation was deleted from the final version of the Act. Id. at 1472.

risk retention groups and the types of coverage such groups may offer[12], (ii) specification of certain accounting procedures[13], and (iii) enumeration of circumstances under which domiciliary and non-domiciliary states may investigate and enjoin the operation of risk retention groups.[14] More specifically, the Act allows domiciliary and non-domiciliary states to investigate the financial condition of risk retention groups and then to enjoin their operation if they are found to be in a "financially hazardous condition." Thus, the Act creates a federal standard for evaluating financially troubled risk retention groups. This standard is significant in two respects. First, it establishes a measure of financial health that is qualitative and general in nature: A risk retention group is in "hazardous financial condition" if it "is unlikely to be able. . . to meet obligations to policy holders with respect to known claims and reasonably anticipated claims; or to pay other obligations in the normal course of business." 15 U.S.C. § 3901(a)(7)(A)-(B) (1993). Also significant is that this finding may be "based on present or reasonably anticipated financial condition." 15 U.S.C. § 3901 (a)(7) (1993) (emphasis added). Significantly, this standard "is intended to make clear that regulatory intervention can occur at a time before a group actually becomes financially impaired or insolvent." House Committee on Energy and Commerce, Risk Retention Amendments of 1986, H.R.Rep. No. 865, 99th Cong., 2d Sess. 11-12 (1986) [hereinafter "H. Rep. No. 865"], reprinted in 1986 U.S.C.C.A.N. at 5308-9. Thus, while the Act creates a federal standard of "hazardous

---

12 See 15 U.S.C. § 3901 (1993).

13 See 15 U.S.C. § 3902(d)(3)(A)-(B) (1993) (loss and loss adjustment calculations must be made by a member of the American Academy of Actuaries or other qualified loss reserve specialist); House Committee on Energy and Commerce, Risk Retention Amendments of 1986, H.R.Rep. No. 865, 99th Cong., 2d Sess. 15 (1986), reprinted in 1986 U.S.C.C.A.N. at 5312 (loss and reserve accountings must be made pursuant to criteria established by the National Association of Insurance Commissioners).

14 See 15 U.S.C. § 3902 (a)(1)(A)-(I) (1993).

financial condition," it leaves to domiciliary and non-domiciliary states the application of the standard to individual risk retention groups.

Primary regulatory authority and enforcement power over risk retention groups is left to domiciliary, or chartering, states. See 15 U.S.C. § 3902 (a)(1) (1993); see also H.Rep. No. 865 at 15, U.S.C.C.A.N. at 5312 (1986 Risk Retention Act amendments confirm the broad authority of chartering states in regulating risk retention groups). Only the chartering jurisdiction may directly regulate the formation and everyday operations of a risk retention group. 15 U.S.C. § 3902 (a)(1) (1993). And the Insurance Commissioner of the domiciliary state has the initial authority to require a risk retention group to submit to a financial examination. See, e.g., 15 U.S.C. § 3902(a)(1)(E)(i) (1993). Only if the domiciliary commissioner fails or declines to initiate a financial examination of a group can a non-domiciliary state then undertake an investigation. Id.

Non-domiciliary states have secondary regulatory authority over risk retention groups. The 1986 amendments to the Act significantly increased the regulatory authority of non-domiciliary states.[15] See H.Rep. No. 865 at 7, reprinted in 1986 U.S.C.C.A.N. at 5304; see also S. Rep. No. 294 at 8. In amending the Act, Congress was particularly concerned with balancing the Act's goal of encouraging the growth of risk retention groups with each state's interest in protecting consumers. See H. Rep. No. 865

---

[15] Even before the Act's passage, concerns had been raised about the ability of non-chartering states to protect consumers from risk retention group practices. See Caldwell, 777 F.2d at 1472. Despite these concerns, non-domiciliary states were initially given little regulatory authority under the original 1981 Act. See H. Rep. No. 865 at 7, reprinted in 1986 U.S.C.C.A.N. at 5304. The 1986 Risk Retention Act amendments went through several versions, each giving increasingly broad regulatory powers to non-chartering states. See 132 Cong. Rec. S 15456 (daily ed. Oct. 6, 1986) (statement of Sen. Gore); 132 Cong. Rec. S 15456 (daily ed. Oct. 6, 1986) (statement of Sen. Lautenberg).

at 21, reprinted in 1986 U.S.C.C.A.N. at 5318 ("the Committee must be alert to indications that the discretion of regulators has been so restricted that practices injurious to the public cannot be adequately addressed by regulators acting in good faith."). To create the appropriate balance, "Congress carefully crafted a scheme which, on the one hand, provides for broad preemption of a non-domiciliary state's licensing and regulatory laws but which, on the other hand, explicitly preserves for those states several very important powers." National Amusement, 905 F.2d at 363-64; see also Corcoran 850 F.2d at 91. Specifically, the Act now provides that many of the regulatory powers of non-domiciliary states are concurrent with those of chartering states.[16] Beyond this, the Act also grants authority to non-domiciliary states to specify acceptable means for risk retention groups to demonstrate "financial responsibility," subject to the Act's anti-discrimination

---

16 Thus non-domiciliary, as well as domiciliary, states may require a risk retention group to:

1. comply with the unfair claim settlement practices under the law of the state.
2. pay, on a nondiscriminatory basis, applicable state premiums and other taxes.
3. participate, on a nondiscriminatory basis, in any mechanism established or authorized under state law for the equitable apportionment of liability insurance losses and expenses.
4. register with and designate the State insurance commissioner as its agent for the purpose of receiving service, legal documents or process.
5. comply with any state law regarding deceptive, false, or fraudulent acts or practices.
6. provide notice, in the text of any insurance policy issued in the non-domiciliary state, that the group may not be subject to certain non-domiciliary state regulations.
7. participate in any insolvency guaranty association, as required by state law.
8. issue insurance policies countersigned by an insurance agent or broker residing in the state.

15 U.S.C. § 3902 (a)(1)(A)-(I) (1993).

provisions. 15 U.S.C. § 3905(d) (1992); see Charter Risk Retention Group Ins. Co. v. Rolka, 796 F. Supp. 154 (M.D. Pa. 1992). States may require such a showing as a condition for granting a risk retention group a license or permit to undertake specified activities within the state. 15 U.S.C. § 3905(d) (1992). In addition, any state may, after an investigation of a group's financial condition, commence a delinquency proceeding. 15 U.S.C. § 3902 (a)(1)(F)(1).[17] The risk retention group may then be required to comply with any order resulting either from such an investigation, or from a voluntary dissolution proceeding. 15 U.S.C. § 3902(a)(1)(F)(i)-(ii) (1993). In sum, the Act grants non-domiciliary states substantial authority to monitor the financial condition of risk retention groups.

Pursuant to this authority, Virginia regulates the operation of risk retention groups within the Commonwealth. See VA.CODE §§ 38.2-5100 et. seq. (Supp. 1992). Specifically, in Virginia, "foreign" risk retention groups must submit several documents to the SCC before commencing operations in the state. These documents include a copy of the group's financial statement, as submitted to its domiciliary state, certified by an independent public accountant and containing a statement of opinion on loss and loss adjustment reserves. VA. CODE § 38.2-5103 (2)(a) (Supp. 1992).[18] Foreign risk retention groups must also submit, upon SCC request, a copy of any information or documents pertaining to an outside audit of the group. VA. CODE § 38.2-5103 (2)(c) (Supp. 1992). Consistent with the Act, submission to an SCC audit is required only if the commissioner of the group's domiciliary state does not initiate an examination

---

17 Worth repeating here is that a non-domiciliary state may not initiate an investigation of a risk retention group unless the chartering state declines to do so. 15 U.S.C. § 3902(a) (1)(E)(i)-(ii) (1993).

18 The Virginia provision mirrors the federal Act, which requires a risk retention group to submit a plan or study to the insurance commissioner of each state in which it intends to do business. See 15 U.S.C. § 3902 (d)(2) (1993).

within sixty (60) days of a SCC request. VA. CODE § 38.2-5103(6) (Supp. 1992).

In summary, the Act's tripartite scheme of concurrent federal and state regulation may be compared to a complex drama in which the Act provides the script that sets the stage and defines the roles for domiciliary and non-domiciliary states. Given this metaphor, NHIC's contentions amount to a claim that non-domiciliary state Virginia, acting through its Bureau of Insurance and the SCC, has misread the script and played a role neither permitted nor contemplated under the Act. Thus, NHIC contends that the Act's scheme or script did not permit Virginia to seek an injunction against NHIC, nor did it permit the SCC to issue an injunction with respect to NHIC or any other risk retention group, because the SCC is not a "court of competent jurisdiction" under the Act. NHIC further argues that even if the SCC is a "court of competent jurisdiction," it did not, in this instance, act like one. Each of these matters must be separately considered, followed by the further consideration of whether this Court should abstain in favor of the Supreme Court of Virginia with respect to any of these matters.

VI.

NHIC's threshold argument is that the Act's expansive preemptive scope precluded Virginia from taking any action, through its Bureau of Insurance and the SCC, to enjoin NHIC from conducting new or additional business in Virginia. This argument is unpersuasive. To the contrary, it appears that Virginia did precisely what the Act authorizes a non-domiciliary state to do in the circumstances. While the Act precludes non-domiciliary states from initiating financial "examinations" of risk retention groups unless chartering states decline to do so,[19] nothing in the

---

[19] 15 U.S.C. § 3902(a)(1)(E)(i). In requiring risk retention groups to submit to "an examination . . . to determine the group's financial condition," the Act does not define the term "examination." Id. Even so, the term's meaning is not difficult to discern given the context. It is apparent that an "examination" in this context consists of whatever investigatory steps or

Act precludes these states from reviewing information developed as a result of a chartering state's examination, and taking appropriate action. Nor does the Act compel a non-domiciliary state to follow the chartering state's lead in taking action based on a financial examination of a risk retention group. Rather, non-domiciliary states are free to follow a course of action with respect to a troubled risk retention group that is different from the course of action plotted by the chartering state, provided that course of action does not contravene the Act.[20] Put another way, the Act does not dictate that a specific action be taken in all situations involving a financially troubled risk retention group. Congress properly recognized that states might reasonably differ on the appropriate course of action to follow to protect their citizens when a financially troubled risk retention group seeks to continue doing business in a state.

Precisely this occurred here. Consistent with the Act, Virginia's Bureau of Insurance did not initiate an independent financial examination of NHIC, but instead appropriately reviewed and relied on relevant information from NHIC's domiciliary state

---

measures, including an audit or review of the group's business or financial books and records, that may be necessary to enable the state regulator to reach confident conclusions concerning the group's financial condition. It is equally apparent that a state does not conduct an "examination" under the Act merely by reviewing either publicly available material or the results of an "examination" performed by another state under the Act.

[20] The Virginia statute under which the SCC enjoined NHIC explicitly contemplates this limitation and provides:

> [t]he Commission is authorized to make use of any of the powers established under Titles 12.1 and 38.2 to enforce the laws of this Commonwealth so long as those powers are not specifically preempted by the Product Liability Risk Retention Act of 1981, as amended by the Risk Retention Amendments of 1986.

VA. CODE § 38.2-5110 (1990).

of Colorado.[21] Also consistent with the Act, Virginia's Bureau of Insurance reviewed these results and information through the lens of the federal standard, namely whether NHIC was "in hazardous financial condition or financially impaired." See 15 U.S.C. § 3902 (a)(1)(H).[22] Further, the Bureau of Insurance acted consistently

---

[21] Specifically, the Bureau's Motion for Injunction against NHIC notes that the decision to seek an injunction was based on a "review of National Home's Annual Statement and the reported negative surplus," as disclosed by CDI's examination.

[22] The parties dispute whether the SCC ever determined that NHIC was in "hazardous financial condition," as defined in the Act. NHIC contends that the SCC merely determined that the company was "financially impaired" and points to the SCC Order, which states, in pertinent part:

> THE COMMISSION. . . is of the opinion and finds that Defendant is financially impaired and that Va. Code § 38.2-5103.8.b specifically prohibits the solicitation or sale of insurance by, or operation of, a risk retention group in the Commonwealth of Virginia that is in hazardous financial condition or is financially impaired.

The SCC, on the other hand, points to the plain language of the Act, which states that "a risk retention group may be enjoined upon petition that the group is "in hazardous financial condition or is financially impaired." 15 U.S.C. § 3902(a)(1)(H) (1993) (emphasis added). SCC proceedings focused sharply on the relationship between the terms "hazardous financial condition," "impaired," and "insolvent" within the meaning of the Risk Retention Act. A spokesman for the Bureau initially stated that, "[w]e have gone beyond financial hazard in this case, Your Honor. Colorado has already found that they are insolvent and/or financially impaired." Hearing Minutes of 6/29/93 at 118, 11. 7-19. The SCC, after receiving additional evidence, concluded that "[h]azardous financial condition by our statute appears to be not quite as bad as financial impairment or insolvent . . .insolvent is the worst." Hearing Minutes of 6/29/93 at 181, 11. 9-16. Thus, a risk retention group may be in "hazardous financial condition" before reaching a state of either insolvency or financial impairment. Hearing Minutes of 6/29/93 at 181, 11. 23-25; at 182 11. 1-2. Accordingly, the SCC apparently concluded that NHIC's financial condition was worse than "hazardous"; it was "impaired." Thus, the SCC correctly concluded that the federal standard governed. But whether the SCC properly

with the Act when it initiated proceedings against NHIC before the SCC on the premise, disputed here, that the SCC is a "court of competent jurisdiction.[23] And finally, nothing in the Act requires that Virginia accept Colorado's policy decision to allow NHIC to continue to operate subject to the Plan.

In sum, there is no merit to NHIC's contention that Virginia's Bureau of Insurance impermissibly conducted an "examination" under the Act when it reviewed and relied on information developed in CDI's examination, or otherwise publicly available information. Nor is there any merit to NHIC's contention that the Act barred Virginia, as a non-domiciliary state, from seeking an injunction from a state court of competent jurisdiction. Still to be decided, however, is whether the SCC is a "state court of competent jurisdiction" under the Act and, if so, whether the issuance of the injunction against NHIC was otherwise substantively appropriate under the Act.[24]

---

construed and applied that standard are issues this Court abstains from deciding, leaving them instead to be decided by the Supreme Court of Virginia.

[23] This disputed premise is the subject of the next section.

[24] NHIC argues that Virginia's traditional "hostility" to the operation of risk retention groups drove the SCC to find a "hazardous financial condition" at NHIC. While acknowledging that states hostile to risk retention group formation and operation could use expanded regulatory powers to "thwart" these groups, Congress amended the Act in 1986 on the presumption that state regulatory officials would act in "good faith." H. Rep. No. 865 at 21, reprinted in 1986 U.S.S.C.A.N. at 5318. NHIC has not shown that the SCC acted in anything less than good faith in partially enjoining the company's Virginia operations. But not decided here, and left instead to the Supreme Court of Virginia pursuant to abstention principles, is whether the SCC's injunction is warranted given the record, the standards established in the Act and any applicable state laws not preempted by the Act.

V.

Domiciliary and non-domiciliary states may require a risk retention group to comply with an injunction issued by a "federal or [s]tate court of competent jurisdiction" where the injunction is based upon a petition by the state insurance commissioner alleging that the group is "in hazardous financial condition or is financially impaired." 15 U.S.C. § 3902 (a)(1)(H) (1993); see also 15 U.S.C. § 3902(e)(2) (1993); 15 U.S.C. § 3902(f)(1)-(2) (1993); 15 U.S.C. § 3906 (1992); National Amusement, 905 F.2d at 367 (permanently enjoining company from "soliciting or transacting, or aiding the transaction of the business of insurance" in Florida). The Virginia Bureau of Insurance brought such a petition before the SCC. The question, therefore, becomes whether the SCC is a "court of competent jurisdiction" within the meaning of the Act, and thus empowered to enjoin risk retention groups upon petition by the Bureau of Insurance.

The Act does not define the phrase "court of competent jurisdiction." Cf. 15 U.S.C. § 3901 (1993) (defining certain terms found in the Act). And there do not appear to be any reported cases defining "court of competent jurisdiction" within the meaning of the Act. Accordingly, the phrase should be given its ordinary meaning. See Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985) (statutory analysis begins "with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose"); see also American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). The phrase "court of competent jurisdiction" normally refers to courts having subject matter jurisdiction. See United States v. Morton, 467 U.S. 822, 828 n.7-8 (1984); Tomai-Minogue v. State Farm Mut. Auto Ins. Co., 770 F.2d 1228, 1242 (4th Cir. 1985) (Sprouse, J., dissenting). The SCC's subject matter jurisdiction "extends to issues of statewide concern" regarding corporate regulation. Atlas Underwriters, Ltd. v. State Corp. Comm'n, 375 S.E.2d 733, 734 (Va. 1989). In addition, the SCC is the government entity charged with licensing foreign corporations, such as NHIC, to do business in the Commonwealth.

VA. CONST. art. IX § 2 (1973). Indeed, except as otherwise prescribed by law, the SCC administers all laws regulating corporations operating in the state. VA. CODE § 12.1-12 (1993). Finally, the SCC has specific regulatory jurisdiction over risk retention groups pursuant to VA. CODE §§ 38.2-5110 et. seq. (1990 and Supp. 1992). Plainly, then, the SCC has subject matter jurisdiction over NHIC.

Given this, the next inquiry is whether the SCC is a "court." Because the Act does not define "court of competent jurisdiction," it seems apparent that Congress expected this determination to be made by reference to state law, for it is state law that typically defines a "state court of competent jurisdiction."[25] Under Virginia law, it is well settled that the SCC may function as a court. The SCC is vested with judicial powers and duties. See VA. CODE §§ 12.1-1 - 12.1-43 (1993); Richmond v. Chesapeake & Potomac Tel. Co., 105 S.E. 127 (Va. 1920); see also Prentis v. Atl. C. L. Co., 211 U.S. 210, 223 (1908) ("we shall assume that for some purposes [the SCC] is a court ... in the commonly accepted sense of that word."). Indeed, the SCC has a stature and dignity equal to that of a circuit court. Atlas Underwriters, 375 S.E.2d at 734; see also Virginia Nat'l Bank v. Virginia, 320 F. Supp. 260, 262 (E.D. Va. 1970), appeal dismissed 448 F.2d 425 (4th Cir. 1971) ("[t]he State Corporation Commission is undeniably a court"). Further, the SCC has the powers of a court of record to administer oaths, compel the attendance of witnesses and production of documents, and punish for contempt, VA. CODE § 12.1-13 (1993), and enforce compliance with its orders through fines and other penalties as prescribed or authorized by law. Id.; VA. CONST. art. IX § 3 (1973). The SCC has the power to issue

---

[25] Analogous authority supports this conclusion. See, e.g., Roudebush v. Hartke, 405 U.S. 15, 21 (1972) (Indiana law should be used in determining whether Indiana court "engages in a judicial function in connection with an election recount"); Hill v. Martin, 296 U.S. 393, 397-98 (1935) (federal court in tax injunction case must use New Jersey law to determine whether pending state tax collection proceedings had "passed from the administrative into the judicial stage.").

temporary and permanent injunctions, VA. CODE § 12.1-13 (1993), and at least one SCC Commissioner must have the qualifications prescribed for judges of courts of record. VA. CODE § 12.1-9 (1993). Finally, like other courts, the SCC must afford all parties reasonable notice of proceedings, an opportunity to be heard, and the opportunity to present evidence prior to entry of any finding, order, or judgment. VA. CONST. art. IX § 3 (1973); VA. CODE § 12.1-28 (1993); see also Commonwealth v. Atl. C.L.R. Co., 55 S.E. 572, 573 (Va. 1906) (noting that "[t]he SCC cannot impose a fine upon a corporation without summoning the company before it, hearing what it has to say in its defense, and passing judgment thereon judicially-in other words, giving the company a fair trial as in any other court."). Unquestionably, then, the SCC may function as a "court of competent jurisdiction" within the meaning of the Act.[26]

---

[26] NHIC argues vigorously that the SCC cannot be a court of competent jurisdiction because it is not independent of the Bureau of Insurance, and the Act's drafters intended that a "court of competent jurisdiction" must be "independent" of the state body responsible for insurance regulation. In support of this contention, NHIC urges the Court to consider affidavits of two persons who ostensibly participated in the drafting of the Act.

Yet affidavits of this genre are not persuasive. Post-enactment comments of legislators carry no probative weight, but only represent the personal views of the legislator. Buckeye Prod. Credit Ass'n v. Farm Credit Admin., 787 F. Supp. 578, 588-89 n. 22 (E.D. Va. 1992), rev'd on other grounds 997 F.2d 11 (4th Cir. 1993); see Bread Political Action Comm. v. Fed. Election Comm'n, 455 U.S. 577, 581 n.3 (1982) (refusing to give probative weight to affidavits of U.S. Senator and executive assistant regarding meaning of contested statutory language); see also Jaekel v. Equifax Marketing Decision Systems, Inc., 797 F. Supp. 486, 489 n.7 (E.D. Va. 1992) (noting that post-hoc nature of legislative history of 1991 Civil Rights Act made it "a contradictory, ambiguous, unreliable indicator of legislative intent."). As the Seventh Circuit recently concluded:

> [s]ubsequent writings may be nothing but wishful thinking, and unless they are uttered as a part of the process of enacting a later law (and therefore show assumptions on which Congress as a whole acted at least once) they are of no account. . . . Legislative history generated in

But this does not end the analysis, as the SCC may also function in a legislative capacity. See Clifton Forge-Waynesboro Tel. Co. v. Commonwealth, 181 S.E. 439, 443 (Va. 1935); Winchester & Strasburg R. Co. v. Commonwealth, 55 S.E. 692, 693 (Va. 1906).[27] Thus, the further question to be answered is whether the SCC acted in its judicial capacity in this instance. As Justice Holmes noted, when a body has both legislative and judicial powers, a determination of the capacity in which the body acts "depends . . . upon the character of the proceedings." Prentis, 211 U.S. at 226. Thus, it has been held that the SCC acts in a legislative capacity when it enters a general order or regulation not directed against a specific party. See American Bankers Life

---

> the course of litigation has even less utility, for it may be designed to mislead, to put an advocate slant on things. . . . [T]he concern for accuracy.. leads us to draw the line at statements made in Congress. The [parties] have not drawn to our attention any case in which a federal court relied on affidavits written for purposes of litigation as a source of reliable information about the meaning of a statute . . . . Our declining to consider latter-day descriptions will induce Members of Congress to put their thoughts on record when they should - before the bill becomes law, when there is still time for other Members to deny the claims or amend the bills to avoid consequences they do not approve.

Farrand v. Lutheran Bhd, 993 F.2d 1253, 1255-56 (7th Cir. 1993), citing Covalt v. Carey Canada, Inc., 860 F.2d 1434, 1438-39 (7th Cir. 1988). See also Continental Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990) (noting that "statements after enactment do not count; the legislative history is valuable only to the extent it shows genesis and evolution.").

In sum, the Act does not, by its terms, require that the SCC be "independent" of the Bureau of Insurance, nor is there any compelling or persuasive reason to read this extra requirement into the Act's text.

[27] See, e.g., Prentis, 211 U.S. at 225 (indicating that a state is constitutionally permitted to vest legislative and judicial powers in the same body).

Assur. Co. v. Div. of Consumer Counsel, Office of Atty. Gen., 263 S.E.2d 867, 874-5 n.8 (Va. 1980). Legislation is future-oriented and changes the existing status quo through the making of a new rule or regulation. See Prentis, 211 U.S. at 225. As such, the SCC acts in its legislative capacity when it sets utility rates. Norfolk v. Chesapeake & Potomac Tel. Co., 64 S.E.2d 772, 776 (Va. 1951). By contrast, it is settled that the SCC acts in an adjudicative capacity when it enters an order or judgment against a specific, named party. See American Bankers, 263 S.E.2d at 874-5 n.8. In a judicial inquiry, the SCC "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." Prentis, 211 U.S. at 225; see New Orleans Public Service, Inc., v. Council of New Orleans ("NOPSI"), 491 U.S. 350, 370 (1989).

Given these general principles, it appears that the SCC acted in its judicial capacity in partially enjoining NHIC. To begin with, the SCC's Order was directed at a single, specified party, was based on past and present facts about NHIC, and was issued pursuant to an existing federal standard. Moreover, the proceedings against NHIC were "manifestly formal and adversarial, 'judicial in nature,'" and subject to judicial review. Phillips v. Virginia Board of Medicine, 749 F. Supp. 715, 722-23 (E.D. Va. 1990) (holding that license revocation proceeding by the Virginia Board of Medicine was "judicial"); see, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986) (state civil rights commission proceedings deemed "judicial" in nature).

Yet, this is not the full story. While several important factors support the conclusion that the SCC acted in its judicial capacity, NHIC contends that other factors point to the opposite conclusion. First the SCC chairman observed, carelessly perhaps, that the SCC conducted NHIC hearings in its legislative capacity. Plainly, the SCC must sit in its judicial capacity in order to function as a "court of competent jurisdiction." Further, the SCC must follow certain prescribed procedures when sitting as a court of record, and it is unclear whether such procedures were in fact followed.

As a general rule, tribunals such as the SCC are not bound by strict or technical rules of evidence, even when sitting in an adjudicatory capacity.[28] See Comment Note.--Hearsay Evidence in Proceedings Before State Administrative Agencies, 36 A.L.R.3d 12, 26 (1971); 2 AM. JUR. 2d Admin. Law § 378 (1962 and Supp. 1992). This general rule applies when the SCC acts in its legislative capacity. See Paging, Inc. v. Afton Communications Corp., 273 S.E.2d 775 (Va. 1981); Norfolk & W. R. Co. v. Commonwealth, 174 S.E. 85 (1934) (decided under prior law). SCC adjudicatory proceedings stand on a different footing. In all complaints, proceedings, contests or controversies in which the SCC decides or renders judgment in its capacity as a court of record, the SCC must follow the common law and statutory rules of evidence observed and administered by Virginia courts. VA. CODE § 12.1-30 (1993); Com. ex rel. Atty. Gen. v. Washington Gas Light Co., 269 S.E.2d 820, 826 (Va. 1980). The record raises substantial questions concerning whether the SCC followed proper evidentiary rules during NHIC proceedings.[29] These

---

[28] See, e.g., Baker v. Babcock & Wilcox Co., 399 S.E.2d 630, 634 (Va. 1990) (relaxed evidentiary standard applies in Virginia Employment Commission proceedings); Williams v. Fuqua, 101 S.E.2d 562, 566 (Va. 1958) (applying relaxed evidentiary standard to Virginia Industrial Commission hearings).

[29] After noting that the SCC was sitting in its legislative capacity, the SCC Chairman further noted that "the rules regarding hearsay evidence are somewhat relaxed as our administrative practice typically allows. We admit some things that are technically hearsay, but we do rule as to their probative value." Hearing Minutes of 6/29/93 at 151, 11. 9-15.

The record discloses some ambivalence concerning the admissibility of hearsay. Thus, questions regarding introduction of the Plan into evidence were raised on the first day of hearings. See Hearing Minutes of 6/28/92 at 123-24. Nonetheless, the matter was not ultimately addressed until the following day, by which time the Plan had been cited on numerous occasions. Hearing Minutes of 6/29/93 at 314-16. There was further confusion over the admissibility of NHIC's annual statements. After an objection by NHIC counsel, the SCC required the Bureau to lay a foundation for introduction of

questions are not reached here. Instead, pursuant to settled principles of abstention, these questions are best left to the Supreme Court of Virginia, the tribunal vested with exclusive jurisdiction to review all final SCC orders.[30]

V.

Abstention under Younger v. Harris, 401 U.S. 37 (1971), requires (i) that there is a pending state judicial proceeding; (ii) that the action implicates important state interests and (iii) that there is an adequate opportunity for the plaintiff to raise federal constitutional claims in a state forum. Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); see Phillips, 749 F. Supp. at 720.[31] Each of these requirements is met here.

First, Younger abstention is appropriate only if there is a pending state judicial proceeding. See Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 238 (1984); Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1228 (4th Cir.1989), cert. denied 495 U.S. 904 (1990). NHIC's appeal of the SCC Order is

---

the annual statements as business records. Hearing Minutes of 6/28/93 at 142-43. The statements, at least in part, were ultimately admitted. The propriety of these SCC rulings is best reviewed and resolved by the Supreme Court of Virginia.

Also best left to the Supreme Court of Virginia is the merits of NHIC's contention that the SCC did not make sufficient findings of fact regarding the injunction's scope. See Hearing Minutes of 6/29/93 at 454, 11. 19-25; at 455 1.1.

30 Va. Const. art. IX § 4 (1973); see Howell v. State Corp. Comm'n, 198 S.E.2d 611 (Va. 1973).

31 While Younger initially applied only to criminal proceedings, the doctrine has been extended to apply in a number of civil contexts. See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986) (state administrative civil rights proceeding); Middlesex County Ethics Comm., 457 U.S. 423 (1982) (state bar disciplinary proceeding); Juidice v. Vail, 430 U.S. 327 (1977) (state contempt proceedings).

currently pending before the Supreme Court of Virginia, which is constitutionally designated to rule on the merits of SCC final orders. See Atlas Underwriters Ltd., 375 S.E.2d at 735 (holding that "the Framers of Article IX § 4 [of the Virginia Constitution] intended that the Supreme Court [of Virginia] have exclusive jurisdiction over all challenges to all actions of the SCC, both judgmental and ministerial"). Thus, there is undoubtedly a pending state judicial action involving the case at bar.[32]

Second, there is no doubt that Younger abstention in the instant case would vindicate important state interests. Virginia has a significant interest in protecting consumers from the potential hazards generated by the continued operation of

---

32 Two proceedings related to the case at bar are ongoing. The first pending proceeding is NHIC's appeal before the Supreme Court of Virginia, which is clearly judicial in nature. The second proceeding stems from additional papers NHIC has filed with the SCC, seeking dissolution of the Order. The SCC contends that since the SCC's proceedings are "manifestly formal and adversarial," and "judicial in nature," see Phillips, 749 F. Supp. at 722, the action pending before the SCC may satisfy the requirement of pending judicial action. See Kim-Stan, Inc. v. Dep't of Waste Management, 732 F. Supp. 646, 649 (E.D. Va. 1990), citing Telco Communications, 885 F.2d at 1225 (indicating that Younger abstention may apply to state proceedings, including administrative hearings, that are "judicial in nature"). NHIC, on the other hand, contends that the proceedings before the SCC are administrative, and the mere availability of state judicial review of such proceedings cannot form the basis for Younger abstention. See Norfolk & W. R. v. Public Utilities Comm'n., 926 F.2d 567, 572 (6th Cir. 1991); Thomas v. Texas State Bd. of Med. Examiners, 807 F.2d 453, 456 (5th Cir. 1987). NHIC's claim is ultimately irrelevant, as the Court is abstaining in favor of the judicial proceedings pending in the Supreme Court of Virginia, not in favor of any pending SCC action. Accordingly, the Court need not reach the issue of whether actions pending before the SCC constitute "pending judicial proceedings" for purposes of Younger abstention.

financially troubled risk retention groups.[33] Indeed, one of the primary purposes behind the 1986 Risk Retention Act amendments was to bolster the ability of non-domiciliary states to develop safeguards to protect consumers from the consequences of insolvent risk retention groups. See H. Rep. No. 865 at 11, reprinted in 1986 U.S.S.C.A.N. at 5308. In addition, the regulation of insurance has been traditionally left to the states, and may invoke such significant state interests that abstention is appropriate. See Alleghany Corp. v. McCartney, 896 F.2d 1138 (8th Cir. 1990) (federal court properly abstained under Younger regarding constitutional challenge to state act under which state Director of Insurance denied application for acquisition of a domestic insurance company).[34] And the Fourth Circuit has

---

[33] This interest is underscored by the SCC's constitutional mandate to represent the interests of Virginia consumers. VA. CONST. art. IX § 2 (1973); VA. CODE § 12.1-12 (1993).

[34] Abstention in the context of insurance regulation has been more frequently considered under the principles set forth in Burford v. Sun Oil Co., 319 U.S. 315 (1943). While some circuits have held that Burford abstention applies when difficult questions of state law arise in the context of insurance regulation, see Hartford Cas. Ins. Co. v. Borg-Warner Corp., 913 F.2d 419 (7th Cir. 1990) (abstaining in light of ongoing state rehabilitation proceedings), other courts have declined to abstain. Compare Melahn v. Pennock Ins., Inc., 965 F.2d 1497, 1507 (8th Cir. 1992), citing Bilden v. United Equitable Ins. Co., 921 F.2d 822, 827 (8th Cir. 1990) ("the factors favoring abstention are simply insufficient in weight and number to overcome the strong preference for exercise of federal jurisdiction, [despite recognition] that [Missouri] has created a complex regulatory scheme to govern insurance and these regulations serve important state interests."); Bob's Home Serv. Inc. v. Warren County, 755 F.2d 625, 627-28 (8th Cir. 1985) (holding that Burford abstention was not appropriate although issue raised was "an important one to the local community and state government.").

Since Younger abstention is proper in the instant case, the Court does not address whether abstention under the doctrines set forth in Burford, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), or Railroad Comm'n v. Pullman Comp., 312 U.S. 496 (1941) might also apply.

recently indicated that abstention should be carefully considered when federal courts are asked to rule upon complex state insurance regulatory schemes. Charleston Area Med. Ctr. Inc. v. Blue Cross and Blue Shield Mut., Inc., 1993 U.S. App. LEXIS 25155, at *19 (4th Cir. 1993) (noting that an analysis of West Virginia's complex insurance regulatory scheme "presents precisely the type of litigation in which federal courts should carefully consider abstaining.").

Deciding in this case whether the SCC properly functioned as a "court of competent jurisdiction" within the meaning of the federal Risk Retention Act has significant implications for future administration of Virginia's risk retention group regulatory scheme. Virginia has a significant interest in determining under what circumstances it may enjoin, or seek some other remedy against, a troubled risk retention group. The Bureau of Insurance obviously has a great interest in determining appropriate fora in which to bring injunctive actions against financially troubled risk retention groups. And state insurance regulators have an interest in knowing what procedures will be followed in regulatory proceedings involving risk retention groups. In light of the state's interest in protecting consumers, as well as the state's interest in clarifying the operation of its risk retention group regulations, the second criterion for Younger abstention is conclusively met.

Finally, Younger abstention is warranted if the plaintiff in the federal action has an adequate opportunity during state proceedings to raise constitutional challenges. Younger, 401 U.S. at 37. NHIC unquestionably has the opportunity to raise its constitutional challenges before the Supreme Court of Virginia. The Virginia Supreme Court is explicitly empowered to hear cases challenging the constitutionality of a law under the United States Constitution. VA. CONST. art. VI § 1 (1973). Because any NHIC constitutional claims are plainly reviewable in state proceedings, the third Younger abstention requirement is satisfied. Thus, all three of the requirements necessary for Younger abstention have been met.

But Younger abstention is not always appropriate, assuming the three prerequisites are met.[35] See Richmond, F. & P. R.R. Co. v. Forst, 4 F.3d 244, 251 (4th Cir. 1993). Abstention is still inappropriate if plaintiff can show that (i) the challenged statute "flagrantly and patently" violates express constitutional provisions or (ii) that plaintiff will suffer irreparable injury if the federal court abstains because there is no adequate remedy at law. Younger, 401 U.S. at 53-54. While the first Younger exception is clearly inapplicable in the instant case,[36] the second exception raises legitimate concerns. Yet, on closer examination, these concerns do not bar Younger abstention in this case.

Pursuant to the second Younger exception, NHIC argues that it will be left "remediless" if the Court abstains, as lengthy delays often encountered in state courts could irreparably harm the company by forcing builders to turn elsewhere for insurance coverage. NHIC further contends that builders currently covered

---

35 The Court is mindful that abstention is "an extraordinary and exceptional exception," and should not be used by a district court to abdicate its duty to fully adjudicate issues before it. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 14 (1983); Cox v. Planning Dist. I Community Mental Health Retardation Services Bd., 669 F.2d 940, 942 (4th Cir. 1982).

36 The "flagrantly unconstitutional" abstention exception has been so narrowly construed as to be rendered "virtually meaningless." Simopoulos v. Virginia State Bd. of Medicine, 644 F.2d 321, 328 (4th Cir. 1981) (holding that action for declaratory judgment and injunctive relief against enforcement of Virginia's anti-abortion statute was properly dismissed under Younger where plaintiff had adequate opportunity to raise constitutional claim in state court). NHIC does not facially challenge the constitutionality of either the federal Risk Retention Act or the Virginia Act. And, as noted herein, the SCC acted within the parameters of the federal Risk Retention Act in electing to partially enjoin NHIC after determining that the company was financially unstable. Finally, NHIC's claim of federal preemption is not entitled to deferential treatment. See NOPSI, 491 U.S. at 365; Olde Discount Corp. v. Tupman, 1 F.3d 202, 213 (3rd Cir. 1993).

by NHIC warranties will be harmed if the SCC injunction is left in place. Considerations of delay are relevant in determining whether abstention is appropriate. See Anderson v. Babb, 632 F.2d 300, 306 n.3 (4th Cir. 1980); see, e.g., Harman v. Forssenius, 380 U.S. 528, 537 (1965) (indicating that a district court properly declined to abstain in challenge to state voting scheme "[g]iven the importance and immediacy of the problem, and the delay inherent" in waiting for state court action). Yet, given the facts of this case, NHIC's argument is not persuasive. Mere delay, in itself, in pending state court proceedings does not necessarily give rise to the type of "irreparable injury" that precludes Younger abstention. See Simopoulos, 644 F.2d at 330; see, e.g., Rakes v. Coleman, 359 F. Supp. 370, 376 (E.D. Va. 1973) (noting that, within the context of pending criminal prosecutions, "cost, anxiety, and inconvenience" do not in themselves give rise to "irreparable injury"). Moreover, the nature of the SCC Order mitigates any injury that NHIC might suffer, as it does not fully preempt NHIC's Virginia operations, but merely prevents NHIC from issuing new policies or certificates of insurance, or amending current policies. Further, the Order remains in effect only until NHIC meets the surplus and capitalization requirements of its chartering state of Colorado. At least theoretically, NHIC could meet these requirements tomorrow, negating any argument that excessive delays in state court will irreparably harm the company. In any event, there is no reason to expect that the Supreme Court of Virginia will decline to act expeditiously in this matter. Given this, the specter of delay is no bar to abstention. Should delay occur, however, NHIC has leave to return to this Court to pursue its claims.

VI.

In summary, the following issues have been decided here.

1. First, the Act does not completely preempt state authority to regulate risk retention groups. Instead, the Act's tripartite scheme of state and federal regulation carefully carves out substantial areas for domiciliary and non-domiciliary states to exercise regulatory authority over risk retention groups.

2. Second, Virginia's Bureau of Insurance did not conduct an "examination" under the Act when it reviewed the results of CDI's examination of NHIC and other publicly available information. Further, after a determination that NHIC was financially unstable, the Act's preemptive scope did not preclude the Bureau of Insurance from seeking an injunction before the SCC, on the premise that the SCC was a "court of competent jurisdiction."

3. Third, the SCC may function as a "state court of competent jurisdiction" within the meaning of the Act when it sits in its adjudicative capacity as a court of record, but not when it acts in its legislative capacity.

Not decided here, but left instead to the Supreme Court of Virginia, are at least the following issues.

1. First, whether the SCC, given the circumstances of this case, acted in its judicial capacity as a court of record.

2. Second, whether the SCC's Order was providently and properly issued given the record presented, the standards set forth in the Act and those principles of Virginia law not inconsistent with the Act.

Accordingly, plaintiff's action is **DISMISSED WITHOUT PREJUDICE.**

An appropriate Order shall issue.

Date: December 3, 1993
Alexandria, Virginia

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NATIONAL HOME INSURANCE COMPANY, (A RISK RETENTION GROUP),	)	
and	)	
HOME BUYERS WARRANTY CORPORATION II,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 93-1006-A**
STATE CORPORATION COMMISSIONOF THE COMMONWEALTH OF VIRGINIA, et. al.,	)	
Defendants.	)	

ORDER

For the reasons stated in the Court's Memorandum Opinion of December 3, 1993, plaintiff's complaint is **DISMISSED WITHOUT PREJUDICE.**

The Clerk is directed to send copies of this Order to all counsel of record.

Date: December 3, 1993
Alexandria, Virginia

_____
UNITED STATES
DISTRICT JUDGE

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JULY 2, 1993

COMMONWEALTH
OF VIRGINIA

At the relation of the

STATE CORPORATION
COMMISSION

v. CASE NO. INS930072

NATIONAL HOME
INSURANCE COMPANY
(A Risk Retention Group),
Defendant

ORDER GRANTING MOTION
FOR TEMPORARY INJUNCTION

ON A FORMER DAY came the Bureau of Insurance ("Bureau"), by counsel, and filed with Clerk of the Commission a Motion for Temporary Injunction; and

THE COMMISSION, having conducted a hearing on the Motion for Temporary Injunction where the Commission heard testimony and received evidence from both the Bureau and Defendant, is of the opinion and finds that Defendant is financially impaired and that Va. Code § 38.2-5103.8.b specifically prohibits the solicitation or sale of insurance by, or operation of, a risk retention group in the Commonwealth of Virginia that is in hazardous financial condition or is financially impaired;

THEREFORE, IT IS ORDERED that pursuant to Va. Code §§ 38.2-220, 38.2-5103.8.b, 38.2-5110, and 15 U.S.C.S. § 3902(e)(2), Defendant be, and it is as of June 30, 1993, temporarily enjoined from issuing any new policies or any new

certificates or other evidences of coverage in the Commonwealth of Virginia until Defendant restores its surplus to the minimum amount required by its state of domicile, with the exception that: (i) Defendant may issue a certificate or other evidence of coverage if it has received a notification of start and a deposit premium on or before June 30, 1993; or (ii) Defendant may issue a certificate or other evidence of coverage if a member builder obtained a building permit on or before June 30, 1993, and the company receives a notification of start and a deposit premium prior to September 1, 1993.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to Robert E. Dungan, Esquire, 33 Page Avenue, Suite 200, Asheville, North Carolina 28801, Counsel for Defendant; C. William Waechter, Jr., Esquire, Williams, Mullen, Christian & Dobbins, P.O. Box 1320, Richmond, Virginia 23210-1320, Counsel for Defendant; and the Bureau of Insurance in care of Deputy Commissioner Alfred W. Gross.

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 1st day of August, 1994.

National Home Insurance Company
(A Risk Retention Group), Appellant,

against Record No. 931052
S.C.C. Case No. INS 930072

Commonwealth of Virginia, at the Relation
of the State Corporation Commission, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 10th day of June, 1994 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

By:
Deputy Clerk

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 7th day of September, 1994.

National Home Insurance Company
(A Risk Retention Group), Appellant,

against Record No. 931052
S.C.C. Case No. INS 930072

Commonwealth of Virginia, at the Relation
of the State Corporation Commission, Appellee.

From the State Corporation Commission

On August 8, 1994 came the appellee, by counsel, and filed a motion to defer issuance of the mandate in this case.

Thereupon came the appellant, by counsel, and filed a response to said motion.

On consideration whereof, the appellee's motion is denied.

A Copy,

Teste:

Clerk

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 10th day of June, 1994.

National Home Insurance Company
(A Risk Retention Group), Appellant,

against Record No. 931052
S.C.C. Case No. INS 930072

Commonwealth of Virginia, at the Relation
of the State Corporation Commission, Appellee.

Upon an appeal of right
from an order entered by the
State Corporation Commission on
the 2nd day of July, 1993.

For reasons stated in writing and filed with the record, the Court is of the opinion that the order appealed from is erroneous. Accordingly, the order is reversed and annulled, the injunction is vacated, and the proceeding is dismissed with leave to the Bureau of Insurance to request the issuance of an injunction in a court of competent jurisdiction if it be so advised.

This order shall be certified to the State Corporation Commission.

A Copy,

Teste:

Clerk

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 931052
(S.C.C. Case No. INS 930072)

NATIONAL HOME INSURANCE COMPANY
(A Risk Retention Group),
Appellant,

v.

STATE CORPORATION COMMISSION,
Appellee.

PETITION FOR REHEARING OF APPELLEE STATE CORPORATION COMMISSION

Stewart E. Farrar
Solicitor General
Anthony Gambardella
General Counsel
Peter B. Smith
Senior Counsel
Michael D. Thomas
Assistant General Counsel
State Corporation Commission
Office of General Counsel
P. O. Box 1197
Richmond, Virginia 23209

Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins
Cantilo, Maisel & Hubbard, L.L.P.
111 Congress Ave., Suite 1700
Austin, Texas 78701

July 11, 1994

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ARGUMENT AND AUTHORITIES 3

I. The Phrase "Court Of Competent Jurisdiction" Is Not Ambiguous. 4

II. This Court Should Not Have Considered The Legislative History Of The Act 7

III. Congress May Not Direct The Commonwealth Of Virginia How To Constitute and Define Her State Courts, And The Act May Not Be So Interpreted. 9

IV. The Court's Opinion Has The Effect Of Vitiating Indirectly The Commission's Jurisdiction Though It Could Not Have Done So Directly. 11

V. The Commission Meets Any Requirement Of Independence Which Reasonably May Be Read Into The Act. 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 5

Anderson v. Commonwealth, 182 Va. 560, 29 S.E.2d 838 (1944) 4

Atlas Underwriters v. State Corp. Comm'n, 237 Va. 45, 375 S.E.2d 733 (1989) 8,16

Blinder, Robinson & Co. v. S.E.C., 837 F.2d 1099 (D.C. Cir. 1988), cert. denied, 488 U.S. 869 (1988) 4

Brown v. Lukhard, 229 Va. 316, 330 S.E.2d 84 (1985) 8

Calder v. Bull, 3 U.S. 386 (1798) 9

Caminetti v. United States, 242 U.S. 470 (1917) 7

Carpenter's Dist. Council v. Dillard Dept. Store, 15 F.3d 1275 (5th Cir. 1994) 5

Cohan v. Thurston, 223 Va. 523, 292 S.E.2d 45 (1982) 8

Commonwealth v. Orange-Madison Cooperative Farm Svc., 220 Va. 655, 261 S.E.2d 532 (1980) 5

Deposit Bank v. Frankfort, 191 U.S. 499 (1903) 4

Federal Deposit Ins. Corp. v. Meyer, __ U.S. __, 114 S.Ct. 996 (1994) 5

Gardner v. Brown, 5 F.3d 1456 (Fed. Cir. 1993), cert. granted, __ U.S. __, 114 S.Ct. 1396 (1994) 6

Gregory v. Ashcroft, __ U.S. __, 111 S.Ct. 2395 (1991) 10

Hill v. Martin, 296 U.S. 393 (1935) 10

Hladys v. Commonwealth, 235 Va. 145, 366 S.E.2d 98 (1988) 15,16

Howlett v. Rose, 496 U.S. 356 (1990) 10

Marsh v. City of Richmond, 234 Va. 4, 360 S.E.2d 163 (1987) 6,8

McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991) 6

National Home Insurance Co. v. State Corp. Commission, 838 F. Supp. 1104 (E.D. Va. 1993) 1,2

Nottingham v. Weld, 237 Va. 416, 377 S.E.2d 621 (1989) 4

Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 (1985) 5

Peery v. Virginia Board of Funeral Directors and Embalmers, et al., 203 Va. 161, 123 S.E.2d 94 (1961) 14

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) 11

Roanoke Gas Co. v. Division of Consumer Counsel, 219 Va. 1072, 254 S.E.2d 102 (1979) 15

Roudebush v. Hartke, 405 U.S. 15 (1972) 10

Tomai-Minogue v. State Farm Mut. Auto. Ins. Co., 770 F.2d 1228 (4th Cir. 1985) 6

Town of Culpeper v. Virginia Elec. & Power Co., 215 Va. 189, 207 S.E.2d 864 (1974) 12

United States v. Morton, 467 U.S. 822 (1984) 6

West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991) 6,7

Wilder v. Attorney General, 247 Va. 119, 439 S.E.2d 398 (1994) 8

Winchester & S. R. Co. v. Commonwealth, 106 Va. 264, 55 S.E. 692 (1906) 8,11,12

STATUTES

15 U.S.C. §§ 3901 through 3906 1

15 U.S.C. §§ 3902(a)(1)(D)-(F), 3902(d), and 3903(c)-(e) 9

15 U.S.C. §§ 3902(a)(1)(H), 3902(e)-(h), 3903(g) and (h), and 3906 9

Code of Virginia
- Section 12.1-12 8,12
- Section 12.1-38 12
- Sections 38.2-5100 through 5115 8,12

MISCELLANEOUS

Constitution of the United States
- Amendment 10 3

Constitution of Virginia
- Article IX, § 2 3,8,12
- Article IX, § 3 8

The State Corporation Commission of the Commonwealth of Virginia respectfully submits this Petition for Rehearing in the above-referenced matter requesting reconsideration and withdrawal of this Court's Opinion of June 10, 1994 (the "Opinion").[1]

STATEMENT OF THE CASE

In National Home Insurance Co. v. State Corp. Commission, 838 F. Supp.1104 (E.D. Va. 1993) the United States District Court for the Eastern District of Virginia (the "District Court") abstained from deciding NHIC's challenge of an injunction entered against it by the Commission (the "Injunction"). While the District Court ruled that the Commission can be a court of competent jurisdiction under the federal statute at issue, it deferred to this Court for a determination of whether the Commission had properly entered the Injunction under the law of Virginia. On direct appeal from the Injunction, this Court in fact addressed the issue of "whether the State Corporation Commission is a court of competent jurisdiction within the meaning of the Federal Liability Risk Retention Act of 1986, 15 U.S.C. §§ 3901 through 3906" (the "Act"). Thus, this Court did not address the state law questions as to which the District Court had deferred to this Court, but instead, decided precisely the same federal question, involving the interpretation of a federal statute, that had been addressed and resolved previously by the District Court.

NHIC's first assignment of error, on which the Court decided this case, complained that the Commission lacked the jurisdiction required to enter an injunction against it because it is not a "court of competent jurisdiction" within the meaning of the Act in that it is not an "independent judicial officer." NHIC's contention, and therefore the Opinion, incorrectly presume that the

---

[1] In this Petition, the parties will be referred to in the same manner as in the Court's Opinion of June 10, 1994. The facts, having been previously set forth in detail in the briefs filed with the Court, will not be repeated in this Petition.

phrase "court of competent jurisdiction" as used in the Act must be assigned a unique meaning which would establish extraordinary conditions not satisfied by the Commission when it issued the Injunction. Although the District Court had previously construed the Act as requiring a determination of whether a tribunal is a court of competent jurisdiction by reference to state law (National Home, 838 F. Supp. at 1114), this Court's Opinion ostensibly holds that such a determination should be made by reference to federal law. The District Court, construing the Act, concluded that no unique definition for the unambiguous phrase "court of competent jurisdiction" applies under the Act; that it should, therefore, be given its ordinary meaning; and, thus, that the Commission could be a court of competent jurisdiction under the Act.

NHIC might have asked this Court to decide whether, under the law of Virginia, the Commission had subject matter jurisdiction over the proceeding below or could enter the Injunction. Alternatively, it might have asked this Court to decide whether, in this case, the Commission had acted in its judicial capacity, as the District Court suggested. Instead, NHIC asked this Court to decide again precisely the same federal question that had been addressed and resolved by the District Court. The Commission respectfully submits that the Court decided a question that it need not have decided and that NHIC was estopped from presenting, and that it did so in a manner which does not comport with applicable law. Moreover, the Court's determination implicitly raises serious state law questions and may undermine substantially Virginia's ability to regulate effectively nondomiciliary risk retention groups doing business in the Commonwealth.

Finally, even if the phrase at issue could be given the arbitrary definition advocated by NHIC, that definition could not properly be construed as NHIC contends and, in any event, it would not preclude the Commission from fulfilling such a role. That is, the statute does not even remotely suggest by its express terms that the phrase "court of competent jurisdiction" requires an "independent judicial officer." Moreover, nowhere in the statute,

nor in the legislative history upon which NHIC and the majority of the Court have relied, is it suggested that such presumed requirement mandates some unique type of institutional separation or independence, beyond the independence which exists in fact between the Commission in its judicial capacity and its subordinate divisions, an independence previously recognized by this Court.

ARGUMENT AND AUTHORITIES

The heart of the issue before this Court is whether an extraordinary and particular meaning can be assigned to the phrase "court of competent jurisdiction" as used in the Act that would divest the Commission of authority to enjoin NHIC as contemplated by the Act. The Court should have answered this question in the negative because a statutory phrase cannot be given a particular meaning not expressly set forth in the statute unless the phrase is ambiguous in that it is capable of two or more ordinary but inconsistent definitions, and the meaning sought to be applied is one of those meanings. NHIC's position and the Court's Opinion are in error in that they apply to the phrase "court of competent jurisdiction" a meaning not expressly called for by the statute and which is not, under applicable authority, among the plain meanings ordinarily assigned to the phrase. Resort cannot be had to a statute's legislative history to create and then resolve an ambiguity. Further, NHIC has led this Court into substantial error, causing it to decide, *sub silentio*, constitutional issues[2] it need not have resolved in a manner substantially impairing the ability of the Commonwealth to regulate risk retention groups doing business within its jurisdiction. Finally, it is worth noting that NHIC is estopped from seeking this Court's redetermination of the issues resolved by the District Court, including that court's conclusion that the phrase was not ambiguous.[3]

---

2 See U.S. Const. amend. X; Va. Const. art. IX, § 2.

3 Brief of Appellee, State Corporation Commission, filed January 11, 1994, ("Brief of Appellee") pages 12-16. While the Commission does not suggest that this Court is bound to follow the decision of the federal district court, that decision, even while on appeal, is certainly binding on NHIC under well-settled principles of collateral estoppel. See, e.g., Deposit Bank v.

I. The Phrase "Court Of Competent Jurisdiction" Is Not Ambiguous.

Even if NHIC were not collaterally estopped from asking this Court to interpret the phrase "court of competent jurisdiction", only two paths exist by which this Court may assign to a statutory phrase a particular meaning. The Court might find that, by its express terms, the statute manifests the intent of Congress to apply that particular meaning to that phrase. Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944). Alternatively, the Court could conclude that the phrase is ambiguous, in that it is susceptible of more than one ordinary definition, one being that particular meaning. Carpenter's Dist. Council v. Dillard Dept. Store, 15 F.3d 1275, 1283 (5th Cir. 1994). Only in the latter case could the Court then resort to a review of legislative history in an effort to ascertain which of the possible ordinary definitions (including the particular meaning) had been intended by Congress. Id. But if a particular meaning is not one commonly ascribed to the phrase, the Court may not then look to legislative history to ascertain whether it should be applied to the phrase at issue. To do so would be to hold that, in this instance, the phrase should be given an extraordinary meaning, something the Court cannot do unless the statute expressly so requires by its terms. See Federal Deposit Ins. Corp. v. Meyer, U.S. __, __, 114 S.Ct. 996, 1001 (1994). In the instant case, the Court accepted NHIC's proposition and held, without analysis and

---

Frankfort, 191 U.S. 499 (1903); Blinder, Robinson & Co. v. S.E.C., 837 F.2d 1099, 1104 n.6 (D.C. Cir. 1988), cert. denied, 488 U.S. 869 (1988). It is well settled in Virginia that a state court must give a federal court decision the same preclusive effect it would be given under federal law, even if a different result would obtain under state law. Nottingham v. Weld, 237 Va. 416, 420, 377 S.E.2d 621, 623 (1989). Thus, NHIC may not relitigate the same issues here. For purposes of this proceeding, the phrase "court of competent jurisdiction" as used in the Act has been conclusively determined not to be ambiguous. Therefore, the question addressed by this Court was not properly before it and should not have been redetermined.

explanation, that (in the context of the Act) the phrase is ambiguous. The Court then defined it by reference to the Act's legislative history. This approach confuses ambiguity (the existence of two or more ordinary or established meanings) with the effort to impose a special meaning by resort to extrinsic evidence of presumed legislative intent, which is not a proper method of statutory interpretation.

It is axiomatic that courts should give statutory terms their established or plain and ordinary meaning unless it appears from the face of the statute that a different meaning was intended by the enacting legislative body. Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985); American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

This Court has noted that "[t]he Act does not define the phrase `court of competent jurisdiction.'" Precisely for that reason, the phrase must be given its ordinary meaning. See, e.g., Meyer, U.S. at _, 114 S.Ct. at 1001; Commonwealth v. Orange-Madison Cooperative Farm Svc., 220 Va. 655, 658-59, 261 S.E.2d 532, 533-34 (1980). Congress need not define each word in a piece of legislation to express its will clearly. Gardner v. Brown, 5 F.3d 1456, 1459 (Fed. Cir. 1993), cert. granted, __ U.S. __, 114 S.Ct. 1396 (1994). A phrase in the context of a statute is unambiguous where it has a clearly accepted meaning in both legislative and judicial practice, even though it is not explicitly defined by the statutory text. West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991); see Marsh v. City of Richmond, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987). When a statute uses a term of art, courts are to presume that Congress intended it to have its established meaning. McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991). It is indisputable that the Act does not on its face indicate in any manner whatsoever (i) that the phrase "court of competent jurisdiction" is to be given any meaning other than its established or plain and ordinary meaning, or (ii) that Congress intended the phrase to mean an "independent judicial officer".

The phrase's established or plain and ordinary meaning is a court that has subject-matter jurisdiction. United States v.

Morton, 467 U.S. 822, 828 & nn. 7-8 (1984)[4]; Tomai-Minogue v. State Farm Mut. Auto. Ins. Co., 770 F.2d 1228, 1242 (4th Cir. 1985) (Sprouse, J., dissenting). It is found in at least one hundred and ninety state appellate court decisions in Virginia. However, only in the case at bar has this Court found the phrase to mean something more than a court having subject-matter and/or personal jurisdiction. NHIC has not directed this Court's attention to any case in which the phrase "court of competent jurisdiction" was held to require anything different from, or any more than, subject-matter jurisdiction. Certainly, NHIC has offered no authority for the proposition that the phrase has ever been held to mean an independent judicial officer. When applied to the instant case, as it should have been, the established definition creates no ambiguity, leaving for determination by this Court only the question of whether, under the law of Virginia, the Commission was such a court. As will be seen, the authorities compel an affirmative answer to that question.[5]

II. This Court Should Not Have Considered The Legislative History Of The Act.

The door to a statute's legislative history can be opened only through a proper finding of ambiguity. That is, if a statute is not ambiguous, review of its history in an attempt to "interpret" it is inappropriate. West Virginia Univ. Hosps., Inc. v. Casey, 499

---

[4] While in some cases, an issue may arise as to whether a court has personal jurisdiction in order to be a court of competent jurisdiction, such a question is not present in the case at bar. It is beyond question that the Commission possessed personal jurisdiction over NHIC.

[5] Generally, that determination turns on whether, under state law, the court has subject-matter jurisdiction. As will be seen, the Commission clearly does. If, on the other hand, NHIC's contention is that the Commission is not sufficiently a court to come within the scope of the phrase in the Act, that contention is also incorrect. As shown below, the Commission is most certainly a court.

U.S. 83, 98 (1991). On this well established point, we should be guided by the succinct admonition of Justice William R. Day:

> If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the Court to enter speculative fields in search of a different meaning. * * * In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

Caminetti v. United States, 242 U.S. 470, 490 (1917). And it is clear that this is the law in Virginia. Recognizing this principle in an opinion authored by Justice Compton, this Court held: "[a]nd, when an enactment is unambiguous, extrinsic legislative history may not be used to create an ambiguity, and then remove it, where none otherwise exists." Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985) (citing Justice Stephenson's opinion in Cohan v. Thurston, 223 Va. 523, 525, 292 S.E.2d 45, 46 (1982)). Indeed, in an opinion authored by Chief Justice Carrico, the Court also held that "if statutory language is not ambiguous but has a usual and plain meaning, rules of construction do not apply and resort to legislative history is both unnecessary and improper." Marsh, 234 Va. at 11, 360 S.E.2d at 167. See this Court's decision written by Justice Hassell in Wilder v. Attorney General, 247 Va. 119, 124, 439 S.E.2d 398, 401 (1994).

Under these rules of statutory construction, this Court is bound by the plain, ordinary, and well-settled meaning of the phrase "court of competent jurisdiction." Despite NHIC's machinations, there is no evidence on the face of the statute that Congress, by this phrase, meant anything other than a court possessing subject-matter jurisdiction.[6] Review of the Act's

---

[6] It is hardly open to question that the Commission is a court possessed of jurisdiction in the case at bar. See, e.g., Va. Const. art. IX, §§ 2, 3; Va. Code § 12.1-12; Va. Code § 38.2-5100 through 5115; Atlas Underwriters v. State Corp. Comm'n, 237 Va. 45, 47, 375 S.E.2d 733, 735 (1989); Winchester & S. R. Co. v. Commonwealth, 106 Va. 264, 270, 55 S.E. 692, 693 (1906).

legislative history in an attempt to assign a new or different interpretation to the phrase is inappropriate and contrary to well-settled state and federal law.

III. Congress May Not Direct The Commonwealth Of Virginia How To Constitute and Define Her State Courts, And The Act May Not Be So Interpreted.

The folly in this unorthodox quest for an unusual congressional intent not revealed by the face of the statute is demonstrated by its lamentable results. NHIC's contention, and the majority's opinion to the extent that it adopts this view, is tantamount to imputing to Congress a desire to dictate to Virginia how she may assign to her state courts jurisdiction over matters left to the Commonwealth. Congress did not, and constitutionally could not have, so intended.

Congress may certainly occupy and preempt certain areas of government, as permitted by the United States Constitution, or it may decline to do so, leaving the same to the states. However, once an area has been left to the states, Congress may not prescribe the manner in which the states may address them. To do so would be a fundamental and impermissible attack on the most basic tenets of our system of federalism. See Calder v. Bull, 3 U.S. 386 (1798). Under these well-settled principles, Congress may not dictate to the Commonwealth of Virginia, or any state, the requirements for a state court of competent jurisdiction. Id. When it passed the Act, Congress expressly provided that enforcement of certain of its provisions would require resort to state or federal courts. See 15 U.S.C. §§ 3902(a)(1)(H), 3902(e)-(h), 3903(g) and (h), and 3906. In those provisions, Congress properly imposed a requirement of judicial action for such enforcement. But it did not attempt, nor could it have sought, to specify which state courts could exercise that authority. Instead, those provisions simply make it clear that such enforcement must be by judicial proceedings, as distinguished from administrative or *ex parte* action of the Insurance Commissioner. Compare 15 U.S.C. §§ 3902(a)(1)(D)-(F), 3902(d), and 3903(c)-(e). But the question of whether the Commission may exercise the power left to the

states by the Act is one soluble only by reference to state law. See, e.g., Howlett v. Rose, 496 U.S. 356 (1990); Roudebush v. Hartke, 405 U.S. 15 (1972); Hill v. Martin, 296 U.S. 393 (1935). Accordingly, this Court must look to Virginia law to determine whether the Commission is a court of competent jurisdiction.[7]

NHIC's argument is not that the Commission has acted in an area left exclusively to the federal government. Rather, it suggests that the Commission has acted within an area expressly left to the states but in a manner that Congress did not permit. In other words, NHIC acknowledges that the Injunction issued against it could properly have been issued by some state court under the terms of the federal statute. But it suggests that, by ascribing a specific meaning to the phrase "court of competent jurisdiction," Congress has established criteria for what kind of state court may issue such injunction. This argument is constitutionally preposterous. Having in the first instance decided that state courts may issue injunctions within a particular area, Congress does not have the constitutional authority to prescribe the qualifications of such courts. See Gregory v. Ashcroft, __ U.S. __, __, 111 S.Ct. 2395, 2402 (1991). It may no more require that the court be an "independent judicial officer" than it may insist that it be comprised of three justices, or require that its judges all be younger than 45 years of age, or even more obviously, require that the members of the court all be from among the landed gentry. Indeed, once an area has been left to the states, it is exclusively up to the states to determine how to govern within it.

It is undoubtedly true that the states may not regulate or govern within an area left to them in a manner that violates the United States Constitution. However, it is well established, both under federal and Virginia law, that the Commission may constitutionally do what it has done in this case. See, e.g., Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Winchester & S. R. Co. v. Commonwealth, 106 Va. 264, 55 S.E. 692 (1906).

---

[7] For a more expansive discussion of the Commission's powers as a court under Virginia law, please refer to Brief of Appellee at pages 17 through 21, and decisions cited therein.

Accordingly, once Congress has decided that the courts of the Commonwealth of Virginia may enjoin NHIC from issuing contracts of insurance within the Commonwealth while impaired, it is exclusively up to Virginia to legislate which of her courts may enter that injunction. She made that decision when the General Assembly assigned subject matter jurisdiction of such cases to the Commission.

IV. The Court's Opinion Has The Effect Of Vitiating Indirectly The Commission's Jurisdiction Though It Could Not Have Done So Directly.

Had the Court addressed squarely the question of whether the Commission is a court with subject-matter jurisdiction of the proceeding below, by its own decisions, it would have been compelled to conclude that it is. Instead, however, the Court has accepted NHIC's invitation to assign an arbitrary interpretation to an unambiguous phrase in a federal statute producing a conclusion that the Commission could not have heard the case below. In effect, then, the Court's opinion interprets a federal statute (in a manner not justified by its terms, and in the absence of ambiguity) so that it deprives the Commission of jurisdiction and judicial authority which is expressly granted by the Act to the Commonwealth, and by the law of the Commonwealth to the Commission.

That the Commission is a court which does, in fact, have jurisdiction over the proceeding below is undeniable. The Commission is vested with legislative, executive, and judicial powers, and is the conduit by which the Commonwealth exercises its police power to regulate various matters, including insurance. Va. Code § 12.1-12; see Winchester, 106 Va. at 207-08, 55 S.E. at 693. Analogous authority from this Court supports the principle that the Commission has exclusive subject matter jurisdiction over the regulation of risk retention groups doing business in Virginia pursuant to Title 38.2, Chapter 51, of the Virginia Code. See, e.g., Town of Culpeper v. Virginia Elec. & Power Co., 215 Va. 189, 192, 207 S.E.2d 864, 866 (1974); Winchester, 106 Va. at 270, 55

S.E. at 697. No other Virginia state court has been granted this authority.[8] If this Court's Opinion in the case at bar is left undisturbed, the natural and unavoidable result is that, unlike every other member of the Union, the Commonwealth of Virginia will be deprived of the ability to exercise fully that regulatory authority left to the states by Congress in the Act. Unlike the citizens of every other state, therefore, the citizens of this Commonwealth will not have the ability to rely on their own state courts for the enforcement of laws enacted for their protection regarding risk retention groups chartered in other jurisdictions. The citizens of the Commonwealth will be relegated to reliance exclusively on the federal courts or on other states' courts.

This Court's Opinion would not only overrule its own well-established jurisprudence but also would substantially rewrite the relevant Virginia Constitution and Virginia Code provisions which grant the Commission jurisdiction in matters such as this one. See, e.g., Virginia Const. art. IX, § 2, Va. Code §§ 12.1-12, 38.2-5110.

This unfortunate dilemma is precipitated by this Court's acceptance of NHIC's invitation that it decide a federal question consisting, in the first instance, of the interpretation of an unambiguous federal statute and, ultimately, of the implicit decision of a Virginia state law question. The Court need have done none of these. It would have sufficed for the Court to resolve the much narrower question of whether the Virginia General Assembly has assigned judicial authority and subject-matter jurisdiction with respect to the enforcement of Virginia's regulatory scheme for risk retention groups chartered in other states to the Commission. That is the question posed by the phrase "court of competent jurisdiction" as used in the Act. Under

---

[8] NHIC's reliance on Virginia Code § 12.1-38 is misplaced. This section grants concurrent jurisdiction to the Commission and other courts only "to hear, determine and enforce ... fines and penalties." Neither a fine nor a penalty is in question in the case at bar.

applicable Virginia law, it is clear that this question must be answered in the affirmative.

V. The Commission Meets Any Requirement Of Independence Which Reasonably May Be Read Into The Act.

Finally, the analysis of whether the Commission is the kind of court presumed to be required by the Act has been applied incorrectly. Assuming, *arguendo*, that there were some extraordinary and special requirement of independence for "courts of competent jurisdiction" under the Act, it does not follow that the Commission fails to satisfy such a requirement.

NHIC's position consists of two equally fallacious premises. The first is that the phrase "independent judicial officer" must necessarily mean institutional separation. The second is that the Commission is not in fact institutionally separate from the Bureau.

Even if it were appropriate for this Court to engage in the review of the Act's legislative history sought by NHIC, it could not find within those sources any indication that, by the passing and unexplained reference of two of its members to "independent judicial officer",[9] Congress intended to dictate to Virginia what institutional relationship may or may not exist between her courts and regulatory agencies. Indeed, a review of the Act's legislative history compels the conclusion that what was really at stake was the allocation of functions as between the insurance regulators and the courts. No reference is made, directly or indirectly, to the

---

[9] The phrase "independent judicial officer" does not appear anywhere in the Act. Indeed, NHIC has not even demonstrated that it ever found its way into any draft of the Act. Rather, NHIC leads this Court to rely heavily, even exclusively, and improperly on the comments of two members of Congress. See Peery v. Virginia Board of Funeral Directors and Embalmers, 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961).

institutional relationship between such courts and the regulator.[10] Given that the hearing resulting in the Injunction was conducted by the Commission sitting as a court, and not by the Commissioner of Insurance as an administrative or *ex parte* proceeding, whatever requirement of independence can be gleaned from a review of the legislative history is clearly satisfied.

However, in the Opinion, this Court said that:

> [i]n contrast to the constitutional and statutory framework in which proceedings under state law are conducted and decided, we believe that, in drafting the Act, Congress intended that there be an institutional separation between the ... commissioner and the decisional body considering the ... request for an injunction.

Thus, this Court has adopted NHIC's unfounded assertions that Congress has imposed specific requirements governing what type of state court may issue those injunctions which the Act authorizes. Such analysis runs counter to well-established law.

Even if this Court were to accept all of NHIC's premises, it still should not have reached the conclusion advocated by NHIC. In fact, the Bureau of Insurance is sufficiently distinct and separate from the Commission sitting as a court. This Court has observed that the Commission is independent of its employees and has held that the Commission is not bound by the recommendations of its staff. See, e.g., Roanoke Gas Co. v. Division of Consumer Counsel, 219 Va. 1072, 1079, 254 S.E.2d 102, 106 (1979).

In its Opinion, the Court noted that the Commissioner of Insurance is an employee of the Commission, that the Bureau, a division of the Commission, sought the Injunction, that the hearing was conducted by the Commission, and that the Commission's

---

[10] In fact, "independent" judicial officer simply means (i) an officer who is different and superior to the Bureau of Insurance, and (ii) which exercises "judicial" authority. The Commission is clearly both.

counsel participated in the hearing. However, none of these facts has ever been found to be a defect by this Court. This Court's consideration of alleged due process violations in Hladys v. Commonwealth, 235 Va. 145, 366 S.E.2d 98 (1988) is especially instructive on this point. There, this Court considered a matter "[i]n which a single state agency had investigated, prosecuted, and decided a case." Id. at 147-48, 366 S.E.2d at 100. Similar to NHIC's assertions here, it was argued in Hladys that the proceedings "[w]ere structurally flawed by the decision-maker's institutional connection with the investigating agency and its chief witness." Id. This Court held that "[i]n the absence of a showing of bias or improper conduct, we do not agree." Id. The Court further reasoned that "[s]tate administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." Id. The Commission is certainly entitled to the deference accorded by this Court in Hladys. See Atlas Underwriters, Ltd. v. State Corp. Comm'n, 237 Va. 45, 47, 375 S.E.2d 733, 734 (1989).

NHIC has not shown (indeed, cannot show) any impropriety or bias on the part of the Commission in the case at bar. Accordingly, this Court must find that the Commission meets any independence requirement necessary under the Act.

CONCLUSION

Accepting NHIC's suggestion, this Court has interpreted an unambiguous federal statutory phrase in an extraordinary and unjustified sense that results in an unintended establishment by Congress of the characteristics required for Virginia's state courts. The Commonwealth's citizens have thereby been deprived of a state remedy available to the citizens of all other states. For the reasons stated herein, the Commission respectfully requests that this Honorable Court grant this Petition for Rehearing and withdraw its decision of June 10, 1994, in this matter.

Respectfully submitted,

STATE CORPORATION COMMISSION

By: _____
Counsel

Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins
Cantilo, Maisel & Hubbard, L.L.P.
111 Congress Ave., Suite 1700
Austin, Texas 78701

Stewart E. Farrar
Solicitor General
Anthony Gambardella
General Counsel
Peter B. Smith
Senior Counsel
Michael D. Thomas
Assistant General Counsel
State Corporation Commission
Office of General Counsel
P. O. Box 1197
Richmond, Virginia 23209

Dated: July 11, 1994

CERTIFICATE OF SERVICE

In accordance with the Rules of the Supreme Court of Virginia, I certify that a true copy of the foregoing Petition for Rehearing was mailed, postage prepaid, on July 11, 1994, to Harvey B. Cohen, Esquire, Cohen, Gettings, Dunham & Harrison, P. C., 2200 Wilson Boulevard, Suite 800, Arlington, Virginia 22201, counsel for National Home Insurance Company.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 65--LIABILITY RISK RETENTION

§ 3901. Definitions

(a) As used in this chapter--

(1) "insurance" means primary insurance, excess insurance, reinsurance, surplus lines insurance, and any other arrangement for shifting and distributing risk which is determined to be insurance under applicable State or Federal law;

(2) "liability"--

(A) means legal liability for damages (including costs of defense, legal costs and fees, and other claims expenses) because of injuries to other persons, damage to their property, or other damage or loss to such other persons resulting from or arising out of--

(i) any business (whether profit or nonprofit), trade, product, services (including professional services), premises, or operations, or

(ii) any activity of any State or local government, or any agency or political subdivision thereof; and

(B) does not include personal risk liability and an employer's liability with respect to its employees other than legal liability under the Federal Employers' Liability Act (45 U.S.C. 51 et seq.);

(3) "personal risk liability" means liability for damages because of injury to any person, damage to property, or other loss or damage resulting from any personal, familial, or household responsibilities or activities, rather than from responsibilities or activities referred to in paragraphs (2)(A) and (2)(B);

(4) "risk retention group" means any corporation or other limited liability association--

(A) whose primary activity consists of assuming and spreading all, or any portion, of the liability exposure of its group members;

(B) which is organized for the primary purpose of conducting the activity described under subparagraph (A);

(C) which--

(i) is chartered or licensed as a liability insurance company under the laws of a State and authorized to engage in the business of insurance under the laws of such State; or

(ii) before January 1, 1985, was chartered or licensed and authorized to engage in the business of insurance under the laws of Bermuda or Cayman Islands and, before such date, had certified to the insurance commissioner of at least one State that it satisfied the capitalization requirements of such State, except that any such group shall be considered to be a risk retention group only if it has been engaged in business continuously since such date and only for the purpose of continuing to provide insurance to cover product liability or completed operations liability (as such terms were defined in this section before the date of the enactment of the Risk Retention Act of 1986);

(D) which does not exclude any person from membership in the group solely to provide for members of such a group a competitive advantage over such a person;

(E) which--

(i) has as its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group; or

(ii) has as its sole owner an organization which has as--

(I) its members only persons who comprise the membership of the risk retention group; and

(II) its owners only persons who comprise the membership of the risk retention group and who are provided insurance by such group;

(F) whose members are engaged in businesses or activities similar or related with respect to the liability to which such members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations;

(G) whose activities do not include the provision of insurance other than--

(i) liability insurance for assuming and spreading all or any portion of the similar or related liability exposure of its group members; and

(ii) reinsurance with respect to the similar or related liability exposure of any other risk retention group (or any member of such other group) which is engaged in businesses or activities so that such group (or member) meets the requirement described in subparagraph (F) for membership in the risk retention group which provides such reinsurance; and

(H) the name of which includes the phrase "Risk Retention Group".

(5) "purchasing group" means any group which--

(A) has as one of its purposes the purchase of liability insurance on a group basis;

(B) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (C);

(C) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and

(D) is domiciled in any State;

(6) "State" means any State of the United States or the District of Columbia; and

(7) "hazardous financial condition" means that, based on its present or reasonably anticipated financial condition, a risk retention group is unlikely to be able--

(A) to meet obligations to policyholders with respect to known claims and reasonably anticipated claims; or

(B) to pay other obligations in the normal course of business.

(b) Nothing in this chapter shall be construed to affect either the tort law or the law governing the interpretation of insurance contracts of any State, and the definitions of liability, personal risk liability, and insurance under any State law shall not be applied for the purposes of this chapter, including recognition or qualification of risk retention groups or purchasing groups.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 65--LIABILITY RISK RETENTION

§ 3902. Risk retention groups

(a) Exemptions from State laws, rules, regulations, or orders

Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would--

(1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group except that the jurisdiction in which it is chartered may regulate the formation and operation of such a group and any State may require such a group to--

(A) comply with the unfair claim settlement practices law of the State;

(B) pay, on a nondiscriminatory basis, applicable premium and other taxes which are levied on admitted insurers and surplus lines insurers, brokers, or policyholders under the laws of the State;

(C) participate, on a nondiscriminatory basis, in any mechanism established or authorized under the law of the State for the equitable apportionment among insurers of liability insurance losses and expenses incurred on policies written through such mechanism;

(D) register with and designate the State insurance commissioner as its agent solely for the purpose of receiving service of legal documents or process;

(E) submit to an examination by the State insurance commissioner in any State in which the group is doing business to determine the group's financial condition, if--

(i) the commissioner of the jurisdiction in which the group is chartered has not begun or has refused to initiate an examination of the group; and

(ii) any such examination shall be coordinated to avoid unjustified duplication and unjustified repetition;

(F) comply with a lawful order issued--

(i) in a delinquency proceeding commenced by the State insurance commissioner if there has been a finding of financial impairment under subparagraph (E); or

(ii) in a voluntary dissolution proceeding;

(G) comply with any State law regarding deceptive, false, or fraudulent acts or practices, except that if the State seeks an injunction regarding the conduct described in this subparagraph, such injunction must be obtained from a court of competent jurisdiction;

(H) comply with an injunction issued by a court of competent jurisdiction, upon a petition by the State insurance commissioner alleging that the group is in hazardous financial condition or is financially impaired; and

(I) provide the following notice, in 10-point type, in any insurance policy issued by such group:

"NOTICE

"This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group."

(2) require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the State is required to belong;

(3) require any insurance policy issued to a risk retention group or any member of the group to be countersigned by an insurance agent or broker residing in that State; or

(4) otherwise discriminate against a risk retention group or any of its members, except that nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations.

(b) Scope of exemptions

The exemptions specified in subsection (a) of this section apply to laws governing the insurance business pertaining to--

(1) liability insurance coverage provided by a risk retention group for--

(A) such group; or

(B) any person who is a member of such group;

(2) the sale of liability insurance coverage for a risk retention group; and

(3) the provision of--

(A) insurance related services;

(B) management, operations, and investment activities; or

(C) loss control and claims administration (including loss control and claims administration services for uninsured risks retained by any member of such group);

for a risk retention group or any member of such group with respect to liability for which the group provides insurance.

(c) Licensing of agents or brokers for risk retention groups

A State may require that a person acting, or offering to act, as an agent or broker for a risk retention group obtain a license from that State, except that a State may not impose any

qualification or requirement which discriminates against a nonresident agent or broker.

(d) Documents for submission to State insurance commissioners

Each risk retention group shall submit--

(1) to the insurance commissioner of the State in which it is chartered--

(A) before it may offer insurance in any State, a plan of operation or a feasibility study which includes the coverages, deductibles, coverage limits, rates, and rating classification systems for each line of insurance the group intends to offer; and

(B) revisions of such plan or study if the group intends to offer any additional lines of liability insurance;

(2) to the insurance commissioner of each State in which it intends to do business, before it may offer insurance in such State--

(A) a copy of such plan or study (which shall include the name of the State in which it is chartered and its principal place of business); and

(B) a copy of any revisions to such plan or study, as provided in paragraph (1)(B) (which shall include any change in the designation of the State in which it is chartered); and

(3) to the insurance commissioner of each State in which it is doing business, a copy of the group's annual financial statement submitted to the State in which the group is chartered as an insurance company, which statement shall be certified by an independent public accountant and contain a statement of opinion on loss and loss adjustment expense reserves made by--

(A) a member of the American Academy of Actuaries, or

(B) a qualified loss reserve specialist.

(e) Power of courts to enjoin conduct

Nothing in this section shall be construed to affect the authority of any Federal or State court to enjoin--

(1) the solicitation or sale of insurance by a risk retention group to any person who is not eligible for membership in such group; or

(2) the solicitation or sale of insurance by, or operation of, a risk retention group that is in hazardous financial condition or is financially impaired.

(f) State powers to enforce State laws

(1) Subject to the provisions of subsection (a)(1)(G) of this section (relating to injunctions) and paragraph (2), nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a risk retention group is not exempt under this chapter.

(2) If a State seeks an injunction regarding the conduct described in paragraphs (1) and (2) of subsection (e) of this section, such injunction must be obtained from a Federal or State court of competent jurisdiction.

(g) States' authority to sue

Nothing in this chapter shall affect the authority of any State to bring an action in any Federal or State court.

(h) State authority to regulate or prohibit ownership interests in risk retention groups

Nothing in this chapter shall be construed to affect the authority of any State to regulate or prohibit the ownership interest in a risk retention group by an insurance company in that State, other than in the case of ownership interest in a risk retention group whose members are insurance companies.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 65--LIABILITY RISK RETENTION

§ 3903. Purchasing groups

(a) Exemptions from State laws, rules, regulations, or orders

Except as provided in this section and section 3905 of this title, a purchasing group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would--

(1) prohibit the establishment of a purchasing group;

(2) make it unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters;

(3) prohibit a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection;

(4) prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;

(5) require that a purchasing group must have a minimum number of members, common ownership or affiliation, or a certain legal form;

(6) require that a certain percentage of a purchasing group must obtain insurance on a group basis;

(7) require that any insurance policy issued to a purchasing group or any members of the group be countersigned by an insurance agent or broker residing in that State; or

(8) otherwise discriminate against a purchasing group or any of its members.

(b) Scope of exemptions

The exemptions specified in subsection (a) of this section apply to--

(1) liability insurance, provided to--

(A) a purchasing group; or

(B) any person who is a member of a purchasing group; and

(2) the provision of--

(A) liability coverage;

(B) insurance related services; or

(C) management services;

to a purchasing group or member of the group.

(c) Licensing of agents or brokers for purchasing groups

A State may require that a person acting, or offering to act, as an agent or broker for a purchasing group obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.

(d) Notice to State insurance commissioners of intent to do business

(1) A purchasing group which intends to do business in any State shall furnish notice of such intention to the insurance commissioner of such State. Such notice--

(A) shall identify the State in which such group is domiciled;

(B) shall specify the lines and classifications of liability insurance which the purchasing group intends to purchase;

(C) shall identify the insurance company from which the group intends to purchase insurance and the domicile of such company; and

(D) shall identify the principal place of business of the group.

(2) Such purchasing group shall notify the commissioner of any such State as to any subsequent changes in any of the items provided in such notice.

(e) Designation of agent for service of documents and process

A purchasing group shall register with and designate the State insurance commissioner of each State in which it does business as its agent solely for the purpose of receiving service of legal documents or process, except that such requirement shall not apply in the case of a purchasing group--

(1) which--

(A) was domiciled before April 1, 1986; and

(B) is domiciled on and after September 25, 1981;
in any State of the United States;

(2) which--

(A) before September 25, 1981, purchased insurance from an insurance carrier licensed in any State; and

(B) since September 25, 1981, purchases its insurance from an insurance carrier licensed in any State;

(3) which was a purchasing group under the requirements of this chapter before October 27, 1986; and

(4) as long as such group does not purchase insurance that was not authorized for purposes of an exemption under this chapter as in effect before October 27, 1986.

(f) Purchases of insurance through licensed agents or brokers acting pursuant to surplus lines laws

A purchasing group may not purchase insurance from a risk retention group that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such State.

(g) State powers to enforce State laws

Nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a purchasing group is not exempt under this chapter.

(h) States' authority to sue

Nothing in this chapter shall affect the authority of any State to bring an action in any Federal or State court.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 65--LIABILITY RISK RETENTION

§ 3904. Securities laws

(a) Ownership interests of members in risk retention groups

The ownership interests of members in a risk retention group shall be--

(1) considered to be exempted securities for purposes of section 77e of this title and for purposes of section 78l of this title; and

(2) considered to be securities for purposes of the provisions of section 77q of this title and the provisions of section 78j of this title.

(b) Investment companies

A risk retention group shall not be considered to be an investment company for purposes of the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

(c) State blue sky laws

The ownership interests of members in a risk retention group shall not be considered securities for purposes of any State blue sky law.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 65--LIABILITY RISK RETENTION

§ 3905. Clarification concerning permissible State authority

(a) State motor vehicle no-fault and motor vehicle financial responsibility laws

Nothing in this chapter shall be construed to exempt a risk retention group or purchasing group authorized under this chapter from the policy form or coverage requirements of any State motor vehicle no-fault or motor vehicle financial responsibility insurance law.

(b) Applicability of exemptions

The exemptions provided under this chapter shall apply only to the provision of liability insurance by a risk retention group or the purchase of liability insurance by a purchasing group, and nothing in this chapter shall be construed to permit the provision or purchase of any other line of insurance by any such group.

(c) Prohibited insurance policy coverage

The terms of any insurance policy provided by a risk retention group or purchased by a purchasing group shall not provide or be construed to provide insurance policy coverage prohibited generally by State statute or declared unlawful by the highest court of the State whose law applies to such policy.

(d) State authority to specify acceptable means of establishing financial responsibility

Subject to the provisions of section 3902(a)(4) of this title relating to discrimination, nothing in this chapter shall be construed to preempt the authority of a State to specify acceptable means of demonstrating financial responsibility where the State has required a demonstration of financial responsibility as a condition for obtaining a license or permit to undertake specified activities.

Such means may include or exclude insurance coverage obtained from an admitted insurance company, an excess lines company, a risk retention group, or any other source regardless of whether coverage is obtained directly from an insurance company or through a broker, agent, purchasing group, or any other person.

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 65--LIABILITY RISK RETENTION

§ 3906. Injunctive orders issued by United States district courts

Any district court of the United States may issue an order enjoining a risk retention group from soliciting or selling insurance, or operating, in any State (or in all States) or in any territory or possession of the United States upon a finding of such court that such group is in hazardous financial condition. Such order shall be binding on such group, its officers, agents, and employees, and on any other person acting in active concert with any such officer, agent, or employee, if such other person has actual notice of such order.

FILED: October 13, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1039
(CA-93-1006-A)

NATIONAL HOME INSURANCE COMPANY; HOME BUYERS WARRANTY CORPORATION II,

Plaintiffs - Appellants

versus

STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF VIRGINIA; THEODORE V. MORRISON, JR., individually and as Chairman of the State Corporation Commission of the Commonwealth of Virginia; PRESTON C. SHANNON, individually and as a Member of the State Corporation Commission of the Commonwealth of Virginia; HULLIHEN W. MOORE, individually and as a member of the State Corporation Commission of the Commonwealth of Virginia,

Defendants - Appellees.

ORDER

Appellants have filed a motion to remand this case to the district court with instructions to vacate, appellees filed a response

in opposition to the motion and appellants filed a reply in support of the motion.

The Court remands this case to the United States District Court for the Eastern District of Virginia at Alexandria with instructions to dismiss the case as moot.

Entered at the direction of Senior Judge Chapman with the concurrence of Chief Judge Ervin and Judge Niemeyer.

For the Court

/s/ Bert M. Montague
Clerk

Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

No. 94-883

In The

Supreme Court of the United States

October Term, 1994

COMMONWEALTH OF VIRGINIA AT THE RELATION
OF THE
STATE CORPORATION COMMISSION,
Plaintiff-Petitioner,

v.

NATIONAL HOME INSURANCE COMPANY
(A Risk Retention Group),
Defendant-Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Virginia

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Harvey B. Cohen
Counsel of Record

R. Scott Caulkins
John C. Pasierb
Cohen, Gettings, Dunham &
Harrison, P.C.
2200 Wilson Boulevard, Suite 800
Arlington, Virginia 22201
(703) 525-2260
(703) 525-2489(Fax)

Counsel for Respondent

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

64 pp

QUESTIONS PRESENTED

I. Whether the Petition should be granted where the issues presented are inconsistent with the positions asserted by the Petitioner below and where, under state procedural law, the Petitioner was prohibited in the proceeding below from raising the inconsistent issues for the first time in the petition for rehearing.

II. Whether this Court should decline review of this matter where there is no Tenth Amendment issue raised by the Virginia Supreme Court's ruling and where there is no conflict among the United States courts of appeals, a United States court of appeals and a state court of last resort, and the underlying facts are so limited and unique that any decision from this Court would provide little guidance to lower federal courts.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	13
I. The Commission is Estopped from Raising its New and Contradictory Arguments in the Petition under the State Procedural Doctrine of Estoppel by Inconsistent Positions. . . .	13
II. This Case does not Present a Tenth Amendment Issue.	17
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Banker's Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1987)	16
Gregory v. Aschcroft, 501 U.S. 452 (1991)	17,18
Hathorn v. Lovorn, 457 U.S. 255 (1982)	13,14
Leech v. Beasley, 203 Va. 955 (1962)	14
Leonard v. Vicksburg, Shreveport & Pacific R.R., 198 U.S. 416 (1905)	13
New York v. U.S., ___ U.S. ___, 112 S.Ct. 2408 (1992)	17,19
Radio Station WOW v. Johnson, 326 U.S. 120 (1945)	13
Rohanna v. Vazzana, 196 Va. 549 (1954)	15
U.S. v. Munsingwear, 340 U.S. 36 (1950)	12
United Fuel Gas Company v. Railroad Commission of Kentucky, 278 U.S. 300 (1929)	16
Williams v. Georgia, 349 U.S. 375 (1955)	13
STATUTES AND RULES	
Rules of the Supreme Court, Rule 10	2
15 U.S.C. § 1983	6
15 U.S.C. § 3901 *et seq.*	1
15 U.S.C. § 3902(a)(1)	18,19
15 U.S.C. § 3902(a)(1)(H)	2 ,3
Rule 5:39, Rules of the Supreme Court of Virginia	12
Va. Code §8.01-676.1(H)	5
Va. Code § 12.1-16 (1950, as amended)	3
Va. Code § 12.1-39 (1950, as amended)	5
Va. Code § 38.2-200 (1950, as amended)	3

No. 94-883

In The

Supreme Court of the United States

October Term, 1994

COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION,
Plaintiff-Petitioner,

v.

NATIONAL HOME INSURANCE COMPANY
(A Risk Retention Group),
Defendant-Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Virginia

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

In the Petition For a Writ of Certiorari, Petitioner, the State Corporation Commission of the Commonwealth of Virginia ("Commission"), asserts positions which are totally inconsistent with positions it took before the Virginia Supreme Court and the United States Court of Appeals for the Fourth Circuit. The most notable inconsistency is the Commission's assertion in the Petition that the Virginia Supreme Court should not have decided the issue of whether the Commission is a "court of competent jurisdiction" under the Federal Risk Retention Act, 15 U.S.C. § 3901 *et seq.* ("Risk Retention Act") (Pet. App. 72a-88a), and that, in deciding the issue, the Virginia Supreme Court violated the Tenth Amendment to the United States

Constitution. The Risk Retention Act's general pre-emption of state law contains an exception permitting a state to seek an injunction from a court of competent jurisdiction. 15 U.S.C. 3902(a)(1)(H). Until the Virginia Supreme Court found that the Commission was not a court of competent jurisdiction, the Commission asserted that the Virginia Supreme Court not only could, but should decide whether the Commission is a court of competent jurisdiction. Further, the Commission took the position that the Federal District Court decision was not binding on the Virginia Supreme Court. The Commission is precluded from taking contradictory positions before this Court in its Petition.

The reason the Commission has abruptly changed its position in the Petition is transparent--it is groping for a constitutional question that it hopes will create a reviewable issue under Rule 10 of the rules of this Court. There are no special or important reasons for this Court to grant the Commission's Petition. The Commission, contrary to its contention in the Petition (Pet. 12 -13), was not impermissibly "forced" by the Virginia Supreme Court to litigate before that Court the question of whether the Commission is a court of competent jurisdiction under the Risk Retention Act. In fact, the Commission urged the Fourth Circuit to hold the parallel federal appeal on this question in abeyance so that the Virginia Supreme Court could decide it. Simply because the Virginia Supreme Court ruled against the Commission, the Commission cannot now justifiably claim that it was improperly forced by the Virginia Supreme Court to litigate the issue.

The Virginia Supreme Court ruled that an agency of the Commonwealth -- the Commission -- is not a court of competent jurisdiction because it is not independent under the unique structure created by Virginia's Constitution and laws. There is no Tenth Amendment question that arises from this finding.

I. Nature of the Case

The Risk Retention Act was enacted by Congress to allow businesses with similar liability risks to form insurance cooperatives called "risk retention groups"("RRGs"). The Risk Retention Act was intended to encourage the formation of RRGs by eliminating the multistate regulation of these entities, leaving primary regulatory authority with the RRGs' "domiciliary state" and prohibiting non–domiciliary states from regulating RRGs except in limited circumstances. Respondent National Home Insurance Company (a Risk Retention Group)("National Home")[1] is an RRG. Its domiciliary state is Colorado. The Risk Retention Act provides that a state's insurance regulator, here the Commission, can only enjoin National Home's operations if it petitions an independent court of competent jurisdiction for an injunction under 15 U.S.C. § 3902(a)(1)(H).

The Commission is vested with regulating insurance in Virginia under *Va. Code* § 38.2-200 (1950, as amended). *Va. Code* § 12.1-16 (1950, as amended) allows the Commission to delegate certain duties and responsibilities to the Commissioner of Insurance. The Commission appoints the Commissioner of Insurance who in turn runs the Bureau of Insurance. The Bureau of Insurance reports to the Commissioner of Insurance. The Commissioner of Insurance reports to the Commission. The Commission reviews the performance of the Commissioner of Insurance and the Bureau of Insurance. The Commission sets the policies followed by the Commissioner of Insurance and the Bureau of Insurance. If the Commission is unhappy with the performance of the Commissioner of Insurance or the staff of the Bureau of Insurance, it simply replaces them. Most importantly, the Commission is the entity that creates policies by

---

[1] National Home is 95% owned by Holden Construction Management, Inc. which is 100% owned by Home Buyers Warranty Corp. National Home has no subsidiaries.

legislating and regulating Risk Retention Groups. The Commissioner of Insurance and the Bureau of Insurance have no powers other than those delegated to them by the Commission and all regulatory insurance powers flow through the Commission to its staff.

II. The Proceeding before the Commission

On April 9, 1993, the Office of General Counsel for the Commission, acting in the name of the Commission, petitioned the Commission for an injunction against National Home. Essentially, the Commission's staff petitioned the Commission for an injunction. The initial Motion requested an injunction for ninety (90) days so the Bureau of Insurance could determine whether to seek a permanent injunction.

A hearing was held before the Commission on the Motion for Temporary Injunction on June 29 and 30, 1993. Before the hearing, National Home filed a motion to dismiss and argued, among other things, that the Risk Retention Act prohibited the Commission from issuing an injunction because it was not a court of competent jurisdiction as required by the Risk Retention Act. The Commission rejected these arguments and proceeded with the hearing.

According to its Chairman, the Honorable Theodore V. Morrison, Jr., the Commission held the hearing in its **legislative** capacity:

> CHAIRMAN MORRISON: We're sitting, I guess, fundamentally in our **legislative** function, and the rules regarding hearsay evidence are somewhat relaxed as our **administrative** practice typically allows. We admit some things that are technically hearsay, but we do rule as to their probative value.

(emphasis added). At the conclusion of the legislative hearing, the Commission issued the Injunction Order. (Pet. App. 47a-48a).

The Injunction Order enjoined National Home from issuing any new policies or new certificates or other evidence of coverage in Virginia until National Home restored its surplus to the minimum amount required by National Home's state of domicile, which was determined at the hearing to be $1.2 million. (Pet. App. 47a-48a). Although the Injunction Order allowed for several limited exceptions, it effectively prohibited National Home from writing insurance in Virginia after September 1, 1993, unless National Home met Colorado's minimum capital and surplus requirements.

Because of the irreparable injury caused by the Injunction Order, National Home filed a Petition for Suspension of Effectiveness of Order with the Commission on July 8, 1993, pursuant to *Va. Code.* §§ 12.1–39 and 8.01–676.1 (H). On July 21, 1993, the Commission denied the Petition for Suspension. National Home filed a notice of appeal with the Virginia Supreme Court and, in its subsequent petition for appeal filed on August 2, 1993, it requested suspension of the effectiveness of the Injunction Order.

III. The District Court Proceeding

When National Home filed its petition for appeal of the Injunction Order to the Virginia Supreme Court, the Virginia Supreme Court was just beginning its August recess and the Justices would not be available to rule on the request to suspend the Commission's order until September.

Virginia is National Home's fifth largest market. If National Home was prohibited from doing business in Virginia for any period because of the Injunction Order, National Home would suffer irreparable harm. Consequently, time was of the essence to National Home to be heard on its objections to the Commission's actions prior to the effective date of the Injunction Order of September 1, 1993. In August 1993, the District Court was the only timely source of relief available to National

Home and its affiliate Home Buyers Warranty Corp. ("HBW") to remedy the irreparable harm to National Home and HBW caused by the issuance of the Injunction Order contrary to the mandate of the Risk Retention Act.

National Home and HBW filed a complaint for a declaratory judgment and injunctive relief in the United States District Court for the Eastern District of Virginia on August 2, 1993, requesting a declaration that the Commission was not an independent court of competent jurisdiction as required by the Risk Retention Act and that, therefore, it lacked the authority under the Risk Retention Act to issue the injunction. The Complaint originally named the Commission as a Defendant. It was amended before the filing of responsive pleadings to add the Commissioners as defendants in their individual and official capacities and to add a cause of action arising under 15 U.S.C. § 1983.

The Commission, and subsequently the Commissioners, responded with a motion requesting, *inter alia*, that the District Court abstain from exercising its jurisdiction or, in the alternative, stay the proceeding for an indefinite period. The basis of the Commission's motion was the ongoing proceeding before the Virginia Supreme Court. Notably, the Commission stated: "[a]bstention is appropriate because the exercise of jurisdiction interferes with ongoing state proceedings of substantial importance and interferes with the important and complex state regulatory framework by which Virginia regulates insurance companies conducting business within Virginia."

On August 26, 1993, National Home and HBW filed a Motion for a Temporary Restraining Order and Preliminary Injunction in the District Court case. On August 27, 1993, the District Court heard the first of three oral arguments. The District Court denied the request for a temporary restraining order on September 3, 1993, but set a hearing on the merits and on the motions filed by the Commission and the Commissioners.

The parties submitted several supplemental briefs requested by the District Court on various issues including abstention.

In the Virginia Supreme Court appeal, the petition for suspension of effectiveness of the Commission's order was denied on September 1, 1993. National Home and HBW continued with the proceeding before the District Court as it appeared unlikely at the time that the Virginia Supreme Court would hear and decide the appeal before it for at least a year.

On December 3, 1993, the District Court issued the Memorandum Opinion. (Pet. App. 17a-45a). In its analysis of the phrase "court of competent jurisdiction," the District Court stated:

> Because the Act does not define "court of competent jurisdiction," it seems apparent that Congress expected this determination to be made by reference to state law, for it is state law that typically defines a "state court of competent jurisdiction."

(Pet. App. 34a).

The District Court cited to the legislative history throughout its opinion (*see* Pet. App. 25a-26a), but it did not look to the legislative history of the phrase "court of competent jurisdiction" even though there is legislative history on point which reflects that the phrase refers to an independent judicial officer. The District Court ruled that the Commission could be a court of competent jurisdiction but declined to decide whether the Commission was acting in that capacity when it issued the injunction. (Pet. App. 45a) National Home and HBW appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit.

On January 11, 1994, the Commission filed its opposition to National Home's appeal in the Virginia Supreme Court. (Res. App. F1) The Commission represented to the Virginia Supreme Court that it **was not bound** by the U.S. District Court Decision

and it could rule differently based on the arguments presented by the parties.[2]

Apparently expecting a ruling in its favor from the Virginia Supreme Court, the Commission made an all out attempt to stop the Fourth Circuit litigation so that the Virginia Supreme Court could decide whether the Commission was a "court of competent jurisdiction." The Commission filed a motion asking the Fourth Circuit to abstain, stay the appeal or place the appeal in abeyance because the issues before the Fourth Circuit were identical to the issues before the Virginia Supreme Court. (Res. App. A1-C9). The Commission argued that the Virginia Supreme Court should decide all issues.

Excerpts from the Commission's motion clearly show that the Commission knew the Virginia Supreme Court would be deciding the issue of whether the Commission was a court of competent jurisdiction, and that it wanted the Virginia Supreme Court to decide the issue. The Commission asked the Fourth Circuit to stay its proceeding to give the Virginia Supreme Court a free hand to decide the issue. Specifically, the Commission represented to the Fourth Circuit that:

> 9. In the State Appeal, NHIC raises, among others, the question of whether the Commission erred in entering the Injunction Order because the Commission is not a court of competent jurisdiction under the Federal Risk Retention Act. In essence, NHIC is

---

[2] In its Opposition filed in the Virginia Supreme Court, the Commission stated:

The major issues in this case have already been decided by the United States District Court for the Eastern District of Virginia. **Although that Court's decision is not absolutely binding on this one,** the Commission submits that it is extraordinarily persuasive here. NHIC should bear a heavy burden to explain to this Court why a different result should be reached in this appeal, which burden it has failed to meet. (Emphasis Added)(Res. App. F2)

asking the Virginia Supreme Court to decide whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act.

* * *

21. On January 10, 1994, NHIC filed its Docketing statement with this Court. In its Docketing Statement, NHIC raises one of the specific issues raised in the State Appeal; to wit:

> Whether the State Corporation Commission is an independent court of competent jurisdiction as required by the Federal Risk Retention Act, 15 U.S.C. § 3901 *et seq.*

* * *

22. NHIC has presented three questions to the Virginia Supreme Court in the State Appeal. One of these questions is the sole issue raised before this Court in the Federal Appeal. Thus, even if this Court were to consider NHIC's Federal Appeal, a complete disposition could not be had. **Only the Virginia Supreme Court, before which all three issues have been joined and briefed, can provide an orderly, efficient, and complete disposition of NHIC's concurrent appeals.**

* * *

24. This Court should abstain from exercising its jurisdiction because NHIC has failed to exhaust its state remedies inasmuch as it is currently pursuing an appeal from the Injunction to the Supreme Court of Virginia, which appeal is not yet complete. **These pending, concurrent proceedings in Virginia implicate matters of substantial state interest where**

> **NHIC's claim will and should, be resolved.** (emphasis added)(Res. App A3-A6).

The Commission also made the following representations:

> The only conceivable way in which the Virginia Supreme Court can resolve the issue presented in the State Appeal is by determining whether the Commission is a court of competent jurisdiction as required by the Federal Risk Retention Act — the sole and identical issue raised before this Court. **Accordingly, the Virginia Supreme Court's decision will be dispositive of the sole basis of NHIC's Federal Appeal.** (emphasis added)(Res. App C-7).

Acknowledging that the Virginia Supreme Court would be deciding whether the Commission was a court of competent jurisdiction under the Risk Retention Act, the Commission strenuously argued before the Fourth Circuit that the Virginia Supreme Court could and should decide all issues. (Res. App. B6). National Home joined in the Commission's Motion to Abstain. (Res. App. D1-D9). The Fourth Circuit placed the appeal in abeyance to allow the Virginia Supreme Court to decide all issues and ordered that it be informed of any action taken by the Virginia Supreme Court. (Res. App. E1-E2).

IV. The Virginia Supreme Court Appeal

The Virginia Supreme Court heard oral argument on February 23, 1994 on all issues before it, including whether the Commission was a court of competent jurisdiction.

While the matter was on appeal to the Virginia Supreme Court, National Home was able to report to the Commission that it met the minimum surplus and capital requirements of the State of Colorado. The Commission, however, did not lift the injunction and refused three requests by National Home for a hearing. Finally, the Commission lifted its Injunction Order, effective March 31, 1994, in an order dated April 1, 1994.

On June 10, 1994, the Virginia Supreme Court entered an order that the Commission's order was erroneous and accordingly reversed and annulled that order, and dismissed the proceeding with leave for the Commission to bring an action in a court of competent jurisdiction if it be so advised. In the accompanying opinion, the Court, after analyzing state law and the Commission's procedural rules, found:

> The Commission is empowered to regulate insurance in Virginia, Code § 38.2-200, and pursuant to Code § 12.1-16, the Commission delegates certain duties and responsibilities to the Commissioner of Insurance, who is also an employee of the Commission and serves at its pleasure. Here, the Bureau of Insurance, a division of the Commission, sought the injunction. The hearing was conducted by the Commission, and its counsel participated. Moreover, the Commission is a party in this appeal urging an affirmance of its actions and rulings.
>
> In contrast to the constitutional and statutory framework in which proceedings under state law are conducted and decided, we believe that, in drafting the Act, Congress intended that there be an institutional separation between the state insurance commissioner and the decisional body considering the insurance commissioner's request for an injunction. Thus, we hold, that for purposes of the Act only, the Commission, as a regulatory tribunal, is neither an"independent judicial officer" nor a court of competent jurisdiction as contemplated by Congress. (Pet. App. 10a-11a).

If the Commission wanted an injunction against National Home, the Virginia Supreme Court stated that it could have petitioned any one of a number of independent state courts with jurisdiction, or federal district courts (Pet. App.11a), which it chose not

to do. Such a court would be the state Circuit Court for the City of Richmond or the United States District Court for the Eastern District of Virginia, several city blocks from the Commission in Richmond.

Following the Virginia Supreme Court's ruling that the Commission was not a court of competent jurisdiction, the Commission filed a petition for rehearing.[3] In this petition, the Commission raised new arguments which contradicted the positions it had previously taken. These new, inconsistent arguments are the sole issues which the Commission has presented in its Petition to this Court. In other words, the Commission realized it had previously failed to raise any novel constitutional or federal issues which could be appealed to this court, so the Commission attempted to overcome this defect in its petition for rehearing. The Virginia Supreme Court denied the petition for rehearing in a one sentence order without any opinion. (Pet. App. 49a).

Once the Virginia Supreme Court ruled on all issues as requested by the Commission, the Fourth Circuit was informed of the decision and the Fourth Circuit remanded the federal appeal to the U.S. District Court with directions to dismiss as moot.[4]

---

[3] Under Rule 5:39, Rules of the Supreme Court of Virginia, a petition for rehearing will not be granted unless one of the justices who decided the case adversely to the applicant is of opinion that there is good cause for such rehearing. National Home did not have the right to file a written opposition to the petition for rehearing; a party only has the right to file an opposition if the petition for rehearing is granted.

[4] National Home requested that the District Court's decision be vacated under the established practice of federal courts in handling civil cases which have become moot on appeal. The proper procedure ". . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *U.S. v. Munsingwear*, 340 U.S. 36, 39-40 (1950) and cases cited therein. The Fourth Circuit did not vacate the District Court's decision as required by this established practice.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. The Commission is Estopped from Raising its New and Contradictory Arguments in the Petition under the State Procedural Doctrine of Estoppel by Inconsisent Positions.

Prior to the adverse ruling against it, the Commission never asserted that the Virginia Supreme Court was barred from hearing the appeal because of the District Court decision. Further, the Commission did not assert that the Virginia Supreme Court was prohibited by the Tenth Amendment from deciding that the Commission is not a court of competent jurisdiction. In fact, the Commission asserted just the opposite. The Commission said the District Court decision was not binding and that the Virginia Supreme Court could resolve all issues before it. (Res. App. F2) Under well established precedent of this Court and state law, the Commission is barred from asserting inconsistent positions in its Petition in an effort to create a novel, reviewable issue.

Whether the Commission waived any right it may have had to assert the District Court decision as a bar to the Virginia Supreme Court's consideration of all issues before it is a question of state law. *Leonard v. Vicksburg, Shreveport & Pacific R.R.*, 198 U.S. 416, 422-423 (1905). A state procedural rule which forbids the raising of federal questions at late stages in the case is a valid exercise of state power. *Williams v. Georgia*, 349 U.S. 375, 382-383 (1955). Virginia's consistent and strict application of the state procedural bar of estoppel by inconsistent positions prevents this Court from reviewing the issues raised by the Commission in the Petition. *See Radio Station WOW v. Johnson*, 326 U.S. 120, 128-129 (1945)(state's consistently applied procedural bar prevents review by this Court).[5]

---

[5] *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982), a case cited by the Commission, affirms the general rule that questions first raised before the

The Virginia Supreme Court has consistently ruled that a party is estopped from taking inconsistent positions in litigation:

> In Virginia, we have . . . approved the general rule that a party is forbidden to assume successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory. A litigant is estopped from taking a position which is inconsistent with one previously assumed, either in the course of litigation for the same cause of action, or in dealings in pais. This wise and salutary policy has been repeatedly followed. *Chesapeake & Ohio Railway Company v. Rison*, 99 Va. 18, 37 S.E. 320; *Canada v. C. H. Beasley & Brothers*, 132 Va. 166, 111 S.E.2; 251, 252; *Arwood v. Hill's Adm'r*, 135 Va. 235, 117 S.E. 603; *Alexander v. Commonwealth*, 137 Va. 477, 120 S.E. 296; *Fitchett v. Parsons*, 142 Va. 163, 128 S.E 457; *Title, etc., Bank v. Clifton Forge National Bank*, 149 Va. 168, 140 S.E. 272; *Nagle v. Syer*, 150 Va. 508, 143 S.E. 690; *Byrd v. Pennsylvania Railroad Company*, 151 Va. 954, 961, 145 S.E. 722."

Leech v. Beasley, 203 Va. 955, 961-962 (1962). "A party cannot either in the course of litigation or in dealings *in pais*, occupy inconsistent positions. Upon that rule election is founded; 'a

---

state's highest court on a petition for a rehearing are not reviewable by this Court. The decision recognizes an exception where the state procedural rule prohibiting review under such circumstances is inconsistently applied. *Hathorn* involved a case where the petitioners had raised a federal question for the first time in the petition for appeal and, looking at Mississippi law, this Court concluded that the Mississippi Supreme Court does not consistently preclude consideration of issues raised for the first time in a petition for rehearing. In the instant case, the Commission is not just raising new issues, it is taking inconsistent positions by raising those issues. Taking inconsistent positions in the same litigation is something that the Virginia Supreme Court has consistently not permitted.

man shall not be allowed' in the language of the Scotch law' to approbate and reprobate' and where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts; the election if made with knowledge of the facts is in itself binding." *Rohanna v. Vazzana*, 196 Va. 549, 553 (1954). The only reason the Commission has changed its position on collateral estoppel is that the opinion of the Virginia Supreme Court came down against the Commission.

The Commission's current position contradicts the position it took in the Fourth Circuit and the Virginia Supreme Court. Arguably, the Commission could have gone to either court to ask for a stay. It chose to urge the Fourth Circuit to abstain, stay the federal appeal or place the federal appeal in abeyance because the issues before the Fourth Circuit and the Virginia Supreme Court were identical. (Res. App. A3-A6, B5-B6, and C7). The Virginia Supreme Court was informed that the Fourth Circuit had placed the federal appeal in abeyance at the request of the Commission pending the Virginia Supreme Court's decision. Having persuaded the Fourth Circuit not to review the District Court's decision upon the representation that the Virginia Supreme Court's decision would be dispositive of the issue of whether the Commission is a court of competent jurisdiction under the Risk Retention Act, the Commission cannot now complain about the Virginia Supreme Court's ruling on that issue. The Commission's statement (Pet. 12-13) that it was forced by the Virginia Supreme Court to litigate the issue twice is inexplicable. It should not be allowed to rewrite the facts of this case in an effort to create an issue to present to this Court.

National Home would be prejudiced by allowing the Commission to change positions. After the Commission told the Virginia Supreme Court that the District Court decision was not binding, National Home joined in the Commission's motion to the Fourth Circuit to abstain from deciding the federal appeal.

The Fourth Circuit ultimately stayed the appeal because of the pending appeal to the Virginia Supreme Court. Following the Virginia Supreme Court ruling, the Fourth Circuit dismissed the appeal as moot. If the Commission is allowed to change its position on the binding effect of the federal case, National Home would be prejudiced because the federal appeal has been dismissed and National Home can no longer have the merits of the appeal heard by the Fourth Circuit.

The relief requested by National Home below was a ruling that the Commission was not a court of competent jurisdiction. There is no reason why the Commission could not have raised a Tenth Amendment argument **before** the ruling from the Virginia Supreme Court. The Commission invoked the jurisdiction of the Virginia Supreme Court to decide all issues without limitation. The Commission never contended, until after the ruling, that the Virginia Supreme Court was barred by the Tenth Amendment from finding that the Commission is not a court of competent jurisdiction. In an analogous situation where a petitioner had attempted to change positions, this Court stated: "The sound discretion which controls the exercise of the extraordinary powers of the Federal Court...should not permit them to be exerted to relieve suitors...from the very action of state authorities which they have invoked." *United Fuel Gas Company v. Railroad Commission of Kentucky*, 278 U.S. 300, 308 (1929)(petitioner challenged statute it had invoked).[6]

---

[6] The Virginia Supreme Court's order denying the petition for rehearing does not indicate whether the merits of the new, inconsistent issues raised in that petition were passed upon by the Virginia Supreme Court. Under the Virginia Supreme Court's rule, National Home could not file an opposition to that petition for rehearing, therefore, the merits of the new, inconsistent issues were not fully briefed. This Court restricts its review of federal issues which have not been "pressed or passed upon below." *Banker's Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1987). The Virginia Supreme Court had an independent basis to deny the petition for rehearing based upon

II. This Case does not Present a Tenth Amendment Issue.

The Commission's new, inconsistent arguments are without merit. The Commission's Tenth Amendment claim that the Virginia Supreme Court's decision imposes" . . .on the States federal requirements in establishing regulatory tribunals in each state" (Pet. 15) is a gross mischaracterization of the decision. Nowhere in the Virginia Supreme Court decision does the Court say that the Risk Retention Act imposes federal requirements in establishing regulatory tribunals in each state. The Virginia Supreme Court decision describes which state tribunals can issue injunctions against an RRG.

The two cases relied upon by the Commission, *New York v. U.S.*, ___ U.S. ___, 112 S.Ct. 2408 (1992) and *Gregory v. Aschcroft*, 501 U.S. 452 (1991) do not support the Commission's argument that the Virginia Supreme Court ruling violated the Tenth Amendment by ruling against the Comission. In *New York v. U.S.*, the Court addressed the Low-Level Radioactive Waste Policy Act of 1985. This Act, in part, required states to either take title to contaminated property or regulate according to the instructions of Congress. This Court found that the Act commandeers the legislative processes of the States by directly proscribing that they enact and enforce a federal regulatory program. *New York v. U.S.*, ___ U.S. ___, 112 S.Ct. at 2428-2429. The Virginia Supreme Court did not find that the Commission was compelled to enact or enforce a federal regulatory program.

In *Gregory v. Aschcroft*, this Court was presented with a suit brought by Missouri state court judges challenging a Missouri state constitution provision requiring that they retire at a certain age. The state court judges claimed that the age provi-

---

the doctrine of inconsistent positions. There is no reason in this case to discard this Court's rule that review should be denied where the issue was "not pressed or passed upon below." *Id.*

sion violated the federal Age Discrimination in Employment Act of 1967 ("ADEA"). This Court found that the ADEA was ambiguous as to whether it applied to judges and, in light of such ambiguity and the Tenth Amendment, it ruled that the ADEA did not proscribe regulations for the ages of state court judges.

In *Gregory*, this Court recognized the authority of the states under the Tenth Amendment to establish qualifications of their government officials. *Gregory v. Aschcroft*, 501 U.S. at 460. The Risk Retention Act has nothing to do with the establishment of qualifications of state officials. Moreover, the Virginia Supreme Court's decision does not reflect an interpretation of the Risk Retention Act which establishes qualifications for officials of the Commission. The Virginia Supreme Court ruled that the Commission was not a court of competent jurisdiction as contemplated in the Risk Retention Act and the Commission was preempted from issuing the injunction.

The Risk Retention Act does not attempt to directly regulate the states, it merely preempts contrary state regulations. Congress left the primary responsibility for regulating RRGs with the RRG's state of domicile (domiciliary state") under that state's existing laws. *See* 15 U.S.C. § 3902(a)(1) ("... the jurisdiction in which [a risk retention group] is chartered may regulate the formation and operation of such a group."). The Act expressly exempts risk retention groups from regulation by non-domiciliary states except in certain very limited circumstances. The pre-emption of non-domiciliary state regulation is found in Section 3(a)(1) of the Act which provides:

> [A] risk retention group is **exempt** from any State law, rule, regulation, or **order** to the extent that such law, rule, regulation, or order would ... make unlawful, or **regulate**, directly or indirectly, the operation of a risk retention group **except** that the jurisdiction in which it is chartered may regulate the formation and operation of such a group.

15 U.S.C. § 3902(a)(1) (emphasis added).

In *New York v. U.S.*, ___ U.S. ___, 112 S.Ct. 2408, 2429, this Court found that Congress has the authority to preempt state regulation under the Tenth Amendment:

> The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

By pre-empting state regulation by the Commission, Congress exercised its powers granted under the Constitution and did not violate the Tenth Amendment. The Risk Retention Act tells the states which entities can and cannot issue injunctions against RRG's. It does not proscribe qualifications for officials of state tribunals. The Commission is wrong to characterize this pre-emption as unconstitutional.

CONCLUSION

The Virginia system for regulating insurance is unique. Unlike the entities of other states charged with regulating insurance, the Commission is given certain powers of a court under Virginia's constitution. In this case, this unique body has attempted to regulate a RRG domiciled in Colorado. RRGs constitute only a small percentage of insurance companies. It is unlikely that the issues decided by the Virginia Supreme Court will ever arise in any other state because they have different regulatory structures. This case does not present special and important issues under Rule 10 which would give the Court an opportunity to provide guidance within the federal judicial system on issues where there is a split between United States courts of appeals, a split between a United States court of appeals and a state court of last resort, or an important issue of federal law.

Unlike other cases, the party seeking review has not been harmed. The Virginia Supreme Court ruled that the Commission could seek an injunction from the courts of general jurisdiction in the Commonwealth or that it could go to a United States District Court. There is no harm worthy of this Court's review.

The Commission lifted the injunction in question on April 1, 1994. There is no important or compelling reason for this Court to review the issuance of an injunction which has been dissolved. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted this 14th day of December, 1994.

Harvey B. Cohen
R. Scott Caulkins
John C. Pasierb
Cohen, Getting, Dunham & Harrison, P.C.
2200 Wilson Boulevard
Arlington, VA 22201
(703) 525-2260
(703)525-2489 (FAX)
Attorneys for Respondent National Home

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 1994, I sent three copies of the foregoing Opposition via first class mail, postage prepaid, to each of the following offices:

Patrick H. Cantilo
Randolph N. Wisener
Cantilo, Maisel & Hubbard, L.L.P.
111 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 478-6000

Drew S. Days, III
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Counsel of Record for Petitioner

I further certify that all parties required to be served have been served.

/s/_____

Harvey B. Cohen

Docket No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

NATIONAL HOME INSURANCE COMPANY;
HOME BUYERS WARRANTY CORPORATION II,

Plaintiffs - Appellants,

v.

STATE CORPORATION COMMISSION
OF THE COMMONWEALTH OF VIRGINIA;
THEODORE V. MORRISON, JR.
individually and as Chairman of the State Corporation
Commission of the Commonwealth of Virginia;
PRESTON C. SHANNON, individually
and as a Member of the State Corporation Commission
of the Commonwealth of Virginia;
HULLIHEN W. MOORE, individually and as a
Member of the State Corporation Commission
of the Commonwealth of Virginia,

Defendants - Appellees.

District Court No. 93-1006-A

On Appeal from the United States District Court for the
Eastern District of Virginia, Alexandria Division

MOTION TO ABSTAIN OR STAY

The State Corporation Commission of the Commonwealth of Virginia (the "Commission"), Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore (collectively, the "Commissioners"), individually and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia, by counsel, respectfully submit their Motion to Abstain or Stay in response to the Appeal filed by National Home Insurance Company ("NHIC") and Home Buyers Warranty Corporation II ("HBWC").

BACKGROUND

1.NHIC is a risk retention group domiciled in the state of Colorado and operating in the Commonwealth of Virginia pursuant to 15 U.S.C. §§ 3901 *et seq.* (the "Federal Risk Retention Act") and §§ 38.2-5100 *et seq.* of the Code of Virginia (the "Virginia Risk Retention Act").

2. In proceedings in Colorado, where it is domiciled, and before the Commission in Richmond, NHIC has been found to be impaired, insolvent, and/or operating in a hazardous financial condition.

3. Proceedings against NHIC were commenced before the Commission on or about April 9, 1993, by Steven T. Foster, Commissioner of Insurance (the "Commissioner"), in the name of the Bureau of Insurance, of which the Commissioner is in charge. Pursuant to both the Virginia Risk Retention Act and the Federal Risk Retention Act, the Commissioner caused a Motion for Temporary Injunction to be filed seeking an order from the Commission partially enjoining the operation of NHIC in Virginia.

4. After extensive proceedings, and following notice and a hearing, on July 2, 1993, the Commission entered its Order Granting Motion for Temporary Injunction (the "Injunction") partially enjoining the operations of NHIC within the Common-

wealth of Virginia subject to certain qualifications therein set forth. (A true and correct copy of the Order Granting Motion for Temporary Injunction is attached to the Memorandum in Support of this Motion as Exhibit "1," and is incorporated herein by reference.)

5. On July 6, 1993, NHIC filed its Notice of Appeal of the Injunction to the Supreme Court of Virginia (the "State Appeal"). (A true and correct copy of NHIC's Notice of Appeal to the Virginia Supreme Court is attached to the Memorandum in Support of this Motion as Exhibit "2," and is incorporated herein by reference.)

6. On July 30, 1993, NHIC filed its Supplemental Notice of Appeal to the Virginia Supreme Court.

7. On August 2, 1993, NHIC filed its Request for Suspension of Effectiveness of the Commission's Order (the "Request for Suspension") in the State Appeal. In connection with the Request for Suspension, the parties briefed extensively the issue of whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act.

8. Also on August 2, 1993, NHIC filed its Petition for Appeal in the State Appeal.

9. In the State Appeal, NHIC raises, among others, the question of whether the Commission erred in entering the Injunction because the Commission is not a court of competent jurisdiction under the Federal Risk Retention Act. In essence, NHIC is asking the Virginia Supreme Court to decide whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act.

10. On August 3, 1993, while its State Appeal was pending, NHIC filed a Complaint for Declaratory Judgment (the "Complaint") in the United States District Court of the Eastern District of Virginia, Alexandria Division (the "District Court") seeking

declaratory and injunctive relief against enforcement of the Injunction against NHIC.

11. On August 20, 1993, before the Commission answered the Complaint, NHIC filed its Amended Complaint adding Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually, and as members of the Commission, as defendants.

12. On August 26, 1993, NHIC filed its Motion for Temporary Restraining Order and Preliminary Injunction with the District Court. Following briefing and a hearing before the District Court, the Motion for Temporary Restraining Order was denied.

13. On September 1, 1993, after receiving briefs from both sides, the Virginia Supreme Court denied NHIC's Request for Suspension. (A true and correct copy of the Virginia Supreme Court's order denying the Request for Suspension is attached to the Memorandum in Support of this Motion as Exhibit "3," and is incorporated herein by reference.)

14. The Virginia Supreme Court granted NHIC's Petition for Appeal and entered its order granting the appeal on October 28, 1993.

15. On November 10, 1993, NHIC filed its Assignments of Error with the Virginia Supreme Court raising, among others, the precise issue that it has now raised before this Court. (A true and correct copy of the Assignments of Error is attached hereto as Exhibit "4," and is incorporated herein by reference.)

16. After the submission of numerous additional briefs and several additional hearings before the District Court, Judge Ellis entered his order dismissing NHIC's action on the Amended Complaint on December 3, 1993.

17. On December 12, 1993, NHIC filed its Opening Brief in the State Appeal.

18. On January 11, 1994, the Commission filed its Brief in the State Appeal.

19. The sole issue presented to this Court has been squarely joined in the State Appeal. NHIC has requested oral argument which probably will take place before the Virginia Supreme Court during either its February or March Term.

20. On December 27, 1993, NHIC filed its Notice of Appeal in the District Court (the "Federal Appeal").

21. On January 10, 1994, NHIC filed its Docketing Statement with this Court. In its Docketing Statement, NHIC raises one of the specific issues raised in the State Appeal; to wit:

> Whether the State Corporation Commission is an independent court of competent jurisdiction as required by the Federal Risk Retention Act, 15 U.S.C. § 3901 *et seq.?*

(A true and correct copy of NHIC's Docketing Statement is attached to the Memorandum in Support of this Motion as Exhibit "4," and is incorporated herein by reference.)

22. NHIC has presented three questions to the Virginia Supreme Court in the State Appeal. One of these questions is the sole issue raised before this Court in the Federal Appeal. Thus, even if this Court were to consider NHIC's Federal Appeal, a complete disposition could not be had. Only the Virginia Supreme Court, before which all three issues have been joined and briefed, can provide an orderly, efficient, and complete disposition of NHIC's concurrent appeals.

MOTION TO ABSTAIN OR STAY

23. The Commission and the Commissioners hereby incorporate paragraphs 1 through 22, *supra*, as if fully set forth herein.

24. This Court should abstain from exercising its jurisdiction because NHIC has failed to exhaust its state remedies inasmuch as it is currently pursuing an appeal from the Injunction to the Supreme Court of Virginia, which appeal is not yet complete. These pending, concurrent proceedings in Virginia implicate matters of substantial state interest where NHIC's claim will, and should, be resolved.

25. This Court should abstain from exercising its jurisdiction as to NHIC's Appeal under the principles announced in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and its progeny.

26. This Court should abstain from exercising its jurisdiction as to NHIC's Appeal under the principles announced in *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny.

27. This Court should abstain from exercising its jurisdiction as to NHIC's Appeal under the principles announced in *Burford v. Sun Oil Company*, 319 U.S. 315 (1943) and its progeny.

28. Alternatively, a stay of the Federal Appeal as a matter of comity is warranted under the facts and inherent equitable powers of this Court.

Wherefore, Premises Considered, the Commission and the Commissioners respectfully pray that this Court stay or abstain from adjudicating NHIC's Federal Appeal and for such other relief, legal or equitable, to which they may be justly entitled.

Respectfully submitted,

The State Corporation Commission of the Commonwealth of Virginia, and Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia

By Counsel
Cantilo, Maisel & Hubbard, L.L.P.

Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins (Va. Bar No. 32834)
111 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 478-6000

Attorneys for Appellees

CERTIFICATE OF CONFERENCE

On January 20, 1994, the undersigned, on behalf of the Commission and the Commissioners, contacted Mr. Harvey Cohen, counsel to NHIC and HBWC, and informed him of the anticipated filing of this Motion to Stay or Abstain. Mr. Cohen stated that he would not consent to the relief sought, and would file a response in opposition to this Motion to Stay or Abstain.

_____

Randolph N. Wisener

Docket No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

NATIONAL HOME INSURANCE COMPANY;
HOME BUYERS WARRANTY CORPORATION II,

Plaintiffs - Appellants,

v.

STATE CORPORATION COMMISSION
OF THE COMMONWEALTH OF VIRGINIA;
THEODORE V. MORRISON, JR.,
individually and as Chairman of the State Corporation
Commission of the Commonwealth of Virginia;
PRESTON C. SHANNON, individually and as a
Member of the State Corporation Commission
of the Commonwealth of Virginia;
HULLIHEN W. MOORE, individually and as a
Member of the State Corporation Commission
of the Commonwealth of Virginia,

Defendants - Appellees.

District Court No. 93-1006-A

On Appeal from the United States District Court for the
Eastern District of Virginia, Alexandria Division

MOTION TO PLACE APPEAL IN ABEYANCE

The State Corporation Commission of the Commonwealth of Virginia (the "Commission"), Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore (collectively, the "Commissioners"), individually and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia, by counsel, respectfully submit their Motion to Place in Abeyance the Appeal filed by National Home Insurance Company ("NHIC") and Home Buyers Warranty Corporation II ("HBWC").

BACKGROUND

1. NHIC is a risk retention group domiciled in the state of Colorado and operating in the Commonwealth of Virginia pursuant to 15 U.S.C. §§ 3901 *et seq.* (the "Federal Risk Retention Act") and §§ 38.2-5100 *et seq.* of the Code of Virginia (the "Virginia Risk Retention Act").

2. In proceedings in Colorado, where it is domiciled, and before the Commission in Richmond, NHIC has been found to be impaired, insolvent, and/or operating in a hazardous financial condition.

3. Proceedings against NHIC were commenced before the Commission on or about April 9, 1993, by Steven T. Foster, Commissioner of Insurance (the "Commissioner"), in the name of the Bureau of Insurance, of which the Commissioner is in charge. Pursuant to both the Virginia Risk Retention Act and the Federal Risk Retention Act, the Commissioner caused a Motion for Temporary Injunction to be filed seeking an order from the Commission partially enjoining the operation of NHIC in Virginia.

4. After extensive proceedings, and following notice and a hearing, on July 2, 1993, the Commission entered its Order Granting Motion for Temporary Injunction (the "Injunction") partially enjoining the operations of NHIC within the Commonwealth of Virginia subject to certain qualifications therein set

forth. (A true and correct copy of the Order Granting Motion for Temporary Injunction is attached to the Memorandum in Support of this Motion as Exhibit "1", and is incorporated herein by reference.)

5. On July 6, 1993, NHIC filed its Notice of Appeal of the Injunction to the Supreme Court of Virginia (the "State Appeal"). (A true and correct copy of NHIC's Notice of Appeal to the Virginia Supreme Court is attached to the Memorandum in Support of this Motion as Exhibit "2", and is incorporated herein by reference.)

6. On July 30, 1993, NHIC filed its Supplemental Notice of Appeal to the Virginia Supreme Court.

7. On August 2, 1993, NHIC filed its Request for Suspension of Effectiveness of the Commission's Order (the "Request for Suspension") in the State Appeal. In connection with the Request for Suspension, the parties briefed extensively the issue of whether the Commission is a court of competent jurisdiction for the purposes of the Federal Risk Retention Act.

8. Also on August 2, 1993, NHIC filed its Petition for Appeal in the State Appeal.

9. In the State Appeal, NHIC raises, among others, the question of whether the Commission erred in entering the Injunction because the Commission is not a court of competent jurisdiction under the Federal Risk Retention Act. In essence, NHIC is asking the Virginia Supreme Court to decide whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act.

10. On August 3, 1993, while the State Appeal was pending, NHIC filed a Complaint for Declaratory Judgment (the "Complaint") in the United States District Court for the Eastern District of Virginia, Alexandria Division (the "District Court"), seeking declaratory and injunctive relief against enforcement of the Commission's Injunction against NHIC.

11. On August 20, 1993, prior to the Commission's having answered the Complaint, NHIC filed its Amended Complaint adding Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually, and as members of the Commission, as defendants.

12. On August 26, 1993, NHIC filed its Motion for Temporary Restraining Order and Preliminary Injunction with the District Court. Following briefing and a hearing before the District Court, the Motion for Temporary Restraining Order was denied.

13. On September 1, 1993, after receiving briefs in opposition and in support of NHIC's Request for Suspension, the Virginia Supreme Court denied the Request for Suspension. (A true and correct copy of the Virginia Supreme Court's order denying the Request for Suspension is attached to the Memorandum in Support of this Motion as Exhibit "4", and is incorporated herein by reference.)

14. The Virginia Supreme Court granted NHIC's Petition for Appeal, entering its order granting the appeal on October 28, 1993.

15. On November 10, 1993, NHIC filed its Assignments of Error with the Virginia Supreme Court raising the precise issue, among others, that it has now raised before this Court. (A true and correct copy of the Assignments of Error is attached hereto as Exhibit "5", and is incorporated herein by reference.)

16. After the submission of numerous additional briefs and additional hearings before the District Court, Judge Ellis entered an order dismissing NHIC's action without prejudice on December 3, 1993.

17. On December 12, 1993, NHIC filed its Opening Brief in the State Appeal.

18. On January 11, 1994, the Commission filed its Brief in the State Appeal.

19. The sole issue presented to this Court has been squarely joined in the State Appeal. NHIC has requested oral argument which will probably take place before the Virginia Supreme Court during either its February or March Term.

20. On December 27, 1993, NHIC filed its Notice of Appeal in the District Court (the "Federal Appeal").

21. On January 10, 1994, NHIC filed its Docketing Statement with this Court. In its Docketing Statement, NHIC raises one of the specific issues raised in the State Appeal; namely:

> Whether the State Corporation Commission is an independent court of competent jurisdiction as required by the Federal Risk Retention Act, 15 U.S.C. § 3901 *et seq.*?

(A true and correct copy of NHIC's Docketing Statement is attached to the Memorandum in Support of this Motion as Exhibit "6", and is incorporated herein by reference.)

22. NHIC has presented three questions to the Virginia Supreme Court in the State Appeal. One of these questions is the sole issue raised before this Court in the Federal Appeal. Thus, even if this Court were to consider NHIC's Federal Appeal, a complete disposition could not be had. Only the Virginia Supreme Court, before which all three issues have been joined and briefed, can provide an orderly, efficient, and complete disposition of NHIC's concurrent appeals.

MOTION FOR ABEYANCE

23. The Commission and the Commissioners hereby incorporate paragraphs 1 through 22, *supra*, as if fully set forth herein.

24. Pursuant to Internal Operating Procedure 12.5, the Commission and the Commissioners move this Court to place the Federal Appeal in abeyance while the sole basis of the Federal Appeal, which has been presented to and briefed before the Virginia Supreme Court, may be resolved. The disposition

of this matter by the Virginia Supreme Court will have an effect on the Federal Appeal because NHIC has asked both this Court and the Virginia Supreme Court to determine whether the Commission is a court of competent jurisdiction under the Federal Risk Retention Act.

25. When the Virginia Supreme Court resolves the issue presented to it in the State Appeal, which is the sole basis of NHIC's Federal Appeal, the Commission and the Commissioners will promptly advise this Court pursuant to Internal Operating Procedure 12.5.

WHEREFORE, PREMISES CONSIDERED, the Commission and the Commissioners respectfully pray that this Court hold this Federal Appeal in abeyance until final disposition of the State Appeal by the Virginia Supreme Court and for such other relief, legal or equitable to which they may be justly entitled.

Respectfully submitted,

The State Corporation Commission of the Commonwealth of Virginia, and Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually, and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia

By Counsel

Cantilo, Maisel & Hubbard, L.L.P.
Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins (Va. Bar No. 32834)
111 Congress Avenue, Suite1700
Austin, Texas 78701
(512)478-6000
Attorney for Appellees

CERTIFICATE OF CONFERENCE

On January 20, 1994, the undersigned, on behalf of the Commission and the Commissioners, contacted Mr. Harvey Cohen, counsel to NHIC and HBWC, and informed him of the anticipated filing of this Motion to Place Appeal in Abeyance. Mr. Cohen stated that he would not consent to the relief sought, and would file a response in opposition to this Motion to Place Appeal in Abeyance.

_____

Randolph N. Wisener

CERTIFICATE OF SERVICE

One copy of the foregoing MOTION TO PLACE APPEAL IN ABEYANCE was served on NHIC and HBWC, through their counsel, Harvey B. Cohen, by overnight delivery, this 20th day of January, 1994, addressed as follows:

Cohen Gettings, Dunham &
Harrison, P.C.
2200 Wilson Blvd., Suite 800
Arlington, Virginia 22101

_____

Randolph N. Wisener

Docket No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

NATIONAL HOME INSURANCE COMPANY;
HOME BUYERS WARRANTY CORPORATION II,

Plaintiffs - Appellants,

v.

STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF VIRGINIA; THEODORE V. MORRISON, JR., individually and as Chairman of the State Corporation Commission of the Commonwealth of Virginia; PRESTON C. SHANNON, individually and as a Member of the State Corporation Commission of the Commonwealth of Virginia; HULLIHEN W. MOORE, individually and as a Member of the State Corporation Commission of the Commonwealth of Virginia,

Defendants - Appellees.

District Court No. 93-1006-A

On Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division

Memorandum In Support Of Motion to Place Appeal In Abeyance

CANTILO, MAISEL & HUBBARD, L.L.P.
Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins
(Va. Bar No. 32834)
111 Congress Ave., Suite 1700
Austin, Texas 78701
(512)478-6000

MEMORANDUM IN SUPPORT OF MOTION TO PLACE APPEAL IN ABEYANCE

The State Corporation Commission of the Commonwealth of Virginia (the "Commission"), Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore (the "Commissioners"), by counsel, respectfully submit this Memorandum in Support of their Motion to Place in Abeyance the Appeal of National Home Insurance Company ("NHIC") and Home Buyers Warranty Corporation II ("HBWC").

I. NATURE OF THE CASE

This case implicates material questions of federalism and comity because, prior to filing this appeal, NHIC has been pursuing (and continues to pursue) another appeal before the Virginia Supreme Court which is considering, among others, the sole question which is raised before this Court. The appeal before the Virginia Supreme Court is at a well-advanced stage. In its blatant forum shopping, NHIC desires to have this Court provide a stop-gap measure in the event the Virginia Supreme Court decides the very issue presented here adversely to NHIC.

The Commission, as authorized by both state and federal law, entered the injunction against NHIC (the "Injunction") because of NHIC's financially hazardous condition. (A true and correct copy of the Injunction is attached hereto as Exhibit "1", and is incorporated herein by reference.) After noticing an appeal of the Injunction to the Virginia Supreme Court (the "State Appeal"), as well as petitioning to have the effectiveness of the Injunction suspended by the Virginia Supreme Court, NHIC filed an action seeking declaratory and injunctive relief from the Injunction in the United States District Court for the Eastern District of Virginia, Alexandria Division (the "District Court"). On December 3, 1993, the District Court dismissed NHIC's action without prejudice. From this decision by the District Court, NHIC now presents its appeal to this Court (the "Federal Appeal") raising one of the very issues which it has

raised in its State Appeal and which is now being considered by the Virginia Supreme Court. The Commission respectfully requests that this Court place this proceeding in abeyance pending the disposition of the sole question raised here by the Virginia Supreme Court.

II. BACKGROUND

A. The Commission.

The Commission is a department of government of the Commonwealth of Virginia, created and empowered by constitutional and legislative authority. *See* Va. Const. art. IX, §§ 1 and 2; Va. Code §§ 12.1-12 and -13. The Commission is vested with legislative, executive, and judicial powers, and is the means by which the Commonwealth exercises its police power to regulate various industries, including insurance. *See* Va. Code § 38.2-200.

B. NHIC and HBWC.

NHIC is a Colorado corporation conducting the business of insurance in Virginia. HBWC, an affiliate of NHIC, is also a Colorado corporation authorized to do business in Virginia.

C. Prior Proceedings.

1. The Proceedings Before the Commission.

After determining that NHIC was in a hazardous financial condition, the Bureau of Insurance (the "Bureau") instituted an action in the Commission against NHIC. A hearing on the Bureau's request for an injunction was held in Richmond before the Commission for two days in June of 1993, during which the Bureau and NHIC offered and cross-examined witnesses, introduced documentary evidence, and presented and argued various motions.

After considering testimony, evidence, and arguments of counsel, the Commission found NHIC to be financially impaired, and entered the Injunction generally enjoining NHIC

from conducting the business of insurance in Virginia.[1] On July 6, 1993, NHIC filed its Notice of Appeal of the Injunction to the Virginia Supreme Court. (A true and correct copy of NHIC's Notice of Appeal in the state proceedings is attached hereto as Exhibit "2", and is incorporated herein by reference.)

2. The Proceedings Before the District Court.

With its State Appeal pending before the Virginia Supreme Court, NHIC filed an action against the Commission and the Commissioners in the District Court raising the same issues that it had raised in its State Appeal and requested declaratory and injunctive relief which would annul the Injunction. On December 3, 1993, Judge Ellis entered an order dismissing NHIC's action without prejudice. *See National Home Ins. Co. v. State Corp. Comm'n,* No. 93-1006-A 1993 WL 497011 (E.D. Va. Dec. 3, 1993). (A true and correct copy of Judge Ellis's decision is attached hereto as Exhibit "3", and is incorporated herein by reference.) On December 27, 1993 — more than six months after filing its Notice of Appeal to the Virginia Supreme Court — NHIC filed its Notice of Appeal of Judge Ellis's decision to this Court.

3. The Current Duplicative Proceeding Before the Virginia Supreme Court.

As noted earlier, NHIC filed its Notice of Appeal to the Virginia Supreme Court in July of 1993. NHIC filed its Supplemental Notice of Appeal to the Virginia Supreme Court on July 30, 1993. On August 2, 1993, NHIC filed its Request for Suspension of Effectiveness of the Commission's Order (the "Request for Suspension") with the Virginia Supreme Court. In connection with the Request for Suspension, NHIC and the

---

[1] No relief was sought, and no order entered, against HBWC in the Commission. Indeed, HBWC was not, and is not, a party in the state proceeding. Nonetheless, disposition by the Virginia Supreme Court of the issues pending before it would dispose of all issues presented by HBWC as well.

Commission briefed the issue of whether the Commission is a court of competent jurisdiction for purposes of the Federal Risk Retention Act. After receiving briefs in opposition and in support of the Request for Suspension, the Virginia Supreme Court denied the Request for Suspension on September 1, 1993. (A true and correct copy of the Virginia Supreme Court's order denying the Request for Suspension is attached hereto as Exhibit "4", and is incorporated herein by reference.)

The sole issue presented to this Court has been squarely joined before the Virginia Supreme Court. On August 2, 1993, NHIC filed its Petition for Appeal in the Virginia Supreme Court. NHIC's petition was granted by the Virginia Supreme Court on October 28, 1993. NHIC filed its Assignments of Error on November 10, 1993. [2] On December 14, 1993, NHIC filed its Opening Brief to the Virginia Supreme Court. On January 11, 1994, the Commission filed its Brief with the Virginia Supreme Court. The precise question raised here was assigned as error by NHIC and briefed by both parties in the State Appeal. NHIC has requested oral argument, and it is anticipated that these arguments will take place before the Virginia Supreme Court during its February or March Term.

III. ARGUMENT

This Appeal Should be Placed in Abeyance Pending Resolution by the Virginia Supreme Court of the Precise Issue now Before this Court.

It is axiomatic that there is a "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Moreover, it is a well established principle that:

---

[2] A true and correct copy of NHIC's Assignments of Error to the Virginia Supreme Court is attached hereto as Exhibit "5", and is incorporated herein by reference.

> a court may, in its discretion, defer or abate proceedings where another suit, involving the identical issues, is pending either in federal or state court, and it would be duplicative, uneconomical and vexatious to proceed.

Blinder, Robinson & Co.. Inc. v. SEC, 692 F.2d 102, 106 (lOth Cir. 1982), *cert. denied*, 471 U.S. 1125 (1985), (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), and *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942)). These time-honored principles are manifested in this Court's Internal Operating Procedure 12.5 which provides that:

> In the interest of docket control the Court may, either on its own motion or upon request, place a case in abeyance pending disposition of matters before this Court or other courts which may affect the ultimate resolution of an appeal.

In its State Appeal, NHIC has raised the following issue:

> The Commission erred in that it had no jurisdiction to enter the Injunction Order against NHIC under the Federal Risk Retention Act because the Commission is not a "court of competent jurisdiction" within the meaning of the Federal Risk Retention Act.
>
> . . .

Appellant's Assignments of Error (Exhibit "5") at 1-2.

In its Federal Appeal, NHIC presents the following question:

> Whether the State Corporation Commission is an independent court of competent jurisdiction as required by the Federal Risk Retention Act, 15 U.S.C. § 3901, *et seq.*

NHIC's Docketing Statement at 2.[3] The only conceivable way in which the Virginia Supreme Court can resolve the issue presented in the State Appeal is by determining whether the Commission is a court of competent jurisdiction as required by the Federal Risk Retention Act — the sole and identical issue raised before this Court. Accordingly, the Virginia Supreme Court's decision will be dispositive of the sole basis of NHIC's Federal Appeal. Naturally, the Virginia Supreme Court's decision will affect the ultimate resolution of the Federal Appeal. A more appropriate candidate for abeyance is difficult to imagine. Consequently, NHIC's Federal Appeal should be placed in abeyance pursuant to this Court's Internal Operating Procedure 12.5.

This Court has held appeals in abeyance on facts which were much less compelling than those presented in the case at bar. *See. e.g., Vincent v. Reynolds Memorial Hospital*, 728 F.2d 250 (4th Cir. 1984) (appeal held in abeyance while West Virginia Supreme Court determined appeal of validity of settlement agreement); *Briley v. Bass*, 750 F.2d 1238, 1240 (4th Cir. 1984) (appeal of district court decision in habeas corpus proceeding remanded and placed in abeyance pending disposition of habeas corpus proceeding in Virginia court).

In the case at bar, an appeal has been perfected and almost completely briefed by the parties in the Virginia Supreme Court. Indeed, the State Appeal was perfected even before the District Court action was ever filed. Thus, the case at bar presents a much more compelling situation for abeyance than did *Vincent* where the state appeal was granted only after the federal court action had been filed. Just as this Court properly refused to waste judicial resources by placing the *Vincent* and *Briley* appeals in abeyance pending resolution by the state court, so should it now

---

[3] A true and correct copy of the Docketing Statement filed by NHIC on January 10, 1994, is attached hereto as Exhibit "6'", and is incorporated herein by reference.

refuse to waste judicial resources on this duplicative adjudication.

As this Court has noted:

> [A] federal court is not precluded, in the exercise of its discretion, from staying proceedings in the action before it pending a decision by a state court, with a view to avoiding wasteful duplication of judicial resources and having the benefit of the state court's views.

Suggs v. Brannon, 804 F.2d 274 (4th Cir. 1986) (quoting *Giulini v. Blessing*, 654 F.2d 189, 193 (2d Cir. 1981)). This reasoning from *Giulini*, where the Second Circuit ordered that a claim be held in abeyance until the state court had resolved certain constitutional issues, is equally compelling here. In the case at bar, NHIC has raised precisely the same issue as it has raised, among others, in its State Appeal. Thus, judicial resources would be wastefully duplicated by allowing NHIC's Federal Appeal to proceed concurrently with the State Appeal. The opportunity for contradictory results and piecemeal litigation is great here. Moreover, by placing this matter in abeyance until the Virginia Supreme Court has ruled on the question of whether the Commission is a court of competent jurisdiction, this Court will have the benefit of the state court's views.[4] These factors counsel heavily in favor of placing NHIC's Federal Appeal in abeyance until its State Appeal is resolved.

---

[4] Notably, and as pointed out by Judge Ellis, since the Federal Risk Retention Act does not define "'court of competent jurisdiction,'" "it seems apparent that Congress expected this determination to be made by reference to state law, for it is state law that typically defines a " 'state court of competent jurisdiction.' " *National Home Ins. Co. v. State Corp. Comm'n,* No. 93-1006-A 1993 WL 497011 at *7 (E.D. Va. Dec. 3, 1993) (citing *Hill v. Martin*, 296 U.S. 393, 397-98 (1935), and *Roudebush v. Hartke,* 405 U.S. 15, 21 (1972)). Under this settled law, surely no tribunal would be better equipped to make this determination than the Supreme Court of Virginia.

IV. CONCLUSION

NHIC is "hedging its bet" by appealing precisely the same issue simultaneously to this Court and to the Virginia Supreme Court. This Federal Appeal is merely NHIC's safety measure to be used if the Virginia Supreme Court's disposition of the very same issue raised here is unfavorable to NHIC. Such blatant playing of one court system against the other must not be countenanced by this Court. For these compelling reasons, the Federal Appeal should be placed in abeyance pending resolution of the sole basis of this appeal by the Virginia Supreme Court.

Respectfully submitted,

The State Corporation Commission of the Commonwealth of Virginia, and Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore, individually, and as Commissioners of the State Corporation Commission of the Commonwealth of Virginia

By Counsel

Cantilo, Maisel & Hubbard, L.L.P.

Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins (Va. Bar No. 32834)
111 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 478-6000
Attorneys for Appellees

Docket No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT

NATIONAL HOME INSURANCE COMPANY
(A Risk Retention Group)
and
HOME BUYERS WARRANTY CORPORATION II,
Plaintiffs-Appellants

v.

STATE CORPORATION COMMISSION
OF THE COMMONWEALTH OF VIRGINIA, et *aL*,
Defendants-Appellees,

Filed: January 28, 1994
District Court No. 93-1006-A

APPELLANTS' JOINDER IN MOTION TO ABSTAIN

Harvey B. Cohen, Va. Bar #6440
R. Scott Caulkins, Va. Bar #23583
John C. Pasierb, Va. Bar #27446
COHEN, GETTINGS, DUNHAM
& HARRISON, P.C.
Arlington, Virginia, 22201
(703) 525-2260
(703) 525-2489 (fax)
Counsel for the Appellants, NHIC and HBW

APPELLANT'S JOINDER IN MOTION TO ABSTAIN

National Home Insurance Company (a Risk Retention Group) ("NHIC") and Home Buyers Warranty Corporation II ("HBW"), hereby join in the motion to abstain filed by the State Corporation Commission ("the Commission") and the Commission's individual members, Theodore V. Morrison, Jr., Preston C. Shannon, and Hullihen W. Moore (hereinafter, the individual members of the Commission will be collectively referred to as the "Commissioners"), and request that this Court abstain and therefore, that the decision of the District Court be vacated and the case remanded with instructions to await the outcome of the state court proceedings.

SUMMARY OF POSITION

By motion, rather than by cross appeal, the Commission and the Commissioners have resurrected their motion to abstain considered and denied by the District Court. The District Court's decision on abstention was correct at the time it was made, but since then, and since the filing of this appeal, circumstances have changed. Only recently, the Virginia Supreme Court notified counsel that it will hear oral argument on the state appeal during the third week of February 1994. Based on the current status of the Virginia Supreme Court appeal, and the case authority of this Court, the appropriate disposition of the appeal before this Court is to vacate the District Court's opinion and remand the case to the District Court with instructions to retain jurisdiction over the case should anything prevent a prompt state court determination. An explanation of the procedural background reflects the current status of both appeals and the reasons why this relief is now appropriate.

PROCEDURAL HISTORY

NHIC, a "risk retention group" under the Risk Retention Act, 15 U.S.C. § 3901, *et seq.* ("the Federal Act"), writes casualty insurance to insure the product liability risks of builders

in connection with the construction of new residential housing. NHIC is composed of builder members who have joined together to self insure themselves under the Federal Act. The Federal Act was intended to insure uniform regulation of risk retention groups by preempting the authority of non-domiciliary states to exercise regulatory authority over risk retention groups operating in their jurisdictions but domiciled in another state. Colorado is NHIC's domiciliary and regulatory state.

From 1986 until 1992, NHIC employed a well-known, independent actuarial firm to determine and certify the adequacy of its reserves. Insurance rates were based upon this professional advice, and as of September 30, 1992, NHIC's reserves had been certified by the firm to be adequate. Based upon the firm's advice, NHIC had been projecting that by the end of 1992 there would be capital and surplus of $3.5 million to $4 million. During the preparation of the 1991 audited financial statements by an accounting firm engaged by NHIC, the accounting firm's staff actuaries performed their own actuarial analysis and reported that NHIC was under-reserved for unearned premiums under this different analysis. A third actuarial study was conducted by a third independent firm to review those findings. NHIC reported this deficit in unearned premium reserves to the Colorado Division of Insurance.

As a result of this change in actuarial models and the resulting under-reserve, NHIC is operating under the direct supervision of the Colorado Division of Insurance and pursuant to an Abatement Plan. NHIC reported the under-reserve to the Commission.

Even though the Commission can only enjoin NHIC's operations if it petitions an independent court of competent jurisdiction for an injunction under 15 U.S.C. 3902(a)(1)(H), the Bureau of Insurance at the relation of the Commission brought an action before the Commission, with the Commissioners as the triers of fact, against NHIC entitled *Commonwealth of*

Virginia at the Relation of the State Corporation Commission v. National Home Insurance Company (A Risk Retention Group) seeking to enjoin NHIC's operations even though NHIC's domiciliary and primary regulatory state under the Federal Act, Colorado, was allowing NHIC to continue operations under a plan of abatement. On July 2, 1993, the Commission entered an Order granting the Commission's motion for temporary injunction ("Injunction Order"), without a petition being filed or a hearing before an independent court of competent jurisdiction. NHIC's objection to the jurisdiction of the Commission to hear the matter pursuant to the Federal Act was made before the Commission and denied. The Injunction Order was to take effect on September 1, 1993.

Following the issuance of the Injunction Order, NHIC petitioned the Commission to suspend the effectiveness of the Injunction Order and offered to post a bond in the amount of $1 million to cover any claims made on warranties in Virginia. The basis of this motion was the absolute lack of any testimony that NHIC was unable to pay any of its obligations as they became due. In fact, the only testimony was that NHIC could pay claims for the next eight years even if no steps were taken under the plan of abatement. The bond offered by NHIC was in an amount sufficient to pay all claims arising in Virginia for several years even without any further infusion of capital called for in Colorado's Abatement Plan. That petition was denied by the Commission and the Commissioners on July 23, 1993.

Virginia is NHIC's fifth largest market. If NHIC were unable to do business in Virginia for any period of time as a result of the Injunction Order, NHIC would suffer irreparable harm. Consequently, time was of the essence to NHIC to be heard on its objections to the Commission's actions prior to the effective date of the Injunction Order of September 1, 1993. NHIC filed its Notice of Appeal of the Injunction Order on July 6, 1993. In its Petition for Appeal, NHIC petitioned for the

suspension of the effectiveness of the Injunction Order until the Supreme Court decided the appeal. Due to the delay in the Court's consideration of the Petition for Suspension occasioned by the Court's August recess, NHIC and HBW filed a complaint for a declaratory judgment and injunctive relief in the United States District Court on August 2, 1993, requesting that the District Court declare that the Commission was not an independent court of competent jurisdiction as required by the Federal Act and that, therefore, it lacked the authority under the Federal Act to issue the injunction. The Complaint originally named the Commission as a Defendant. It was amended before the filing of responsive pleadings to add the Commissioners as defendants in their individual and official capacities and to add a cause of action arising under 15 U.S.C. § 1983. The District Court was the only timely source of relief available to NHIC and HBW in August 1993 to remedy the irreparable harm to NHIC and HBW caused by the issuance of the Injunction Order contrary to the Federal Act.

The Commission, and subsequently the Commissioners, responded with a motion requesting, *inter alia,* that the District Court abstain from exercising its jurisdiction or, in the alternative, stay the proceeding for an indefinite period of time. The basis of the Commission's motion was the ongoing proceeding before the Virginia Supreme Court.

On August 26, 1993, NHIC and HBW filed a Motion for Temporary Restraining Order and Preliminary Injunction in the District Court case. On August 27, 1993, the District Court heard the first of three oral arguments. The District Court denied the request for a temporary restraining order on September 3. 1993. but set a hearing on the merits and on the motions filed by the Commission and the Commissioners. The parties submitted several supplemental briefs requested by the District Court on various issues including abstention.

In the Supreme Court Appeal, the petition for suspension of effectiveness of order was denied by the Supreme Court of Virginia on September 7, 1993. The Commission delayed transmitting the record to the Virginia Supreme Court, delaying the appeal before that Court. NHIC and HBW continued the proceeding before District Court as it appeared unlikely at that time that the Virginia Supreme Court would hear and decide the appeal before it for at least a year.

On December 3, 1993, the District Court issued the Memorandum Opinion which is the subject of this appeal. The District Court decided not to abstain from ruling on whether the Commission was a court of competent jurisdiction under the Federal Act, but did abstain under *Younger v. Harris,* 401 U.S. 37 (1971) from reviewing the proceeding before the Commission to determine if the Commission was sitting in its legislative or judicial capacity during the proceeding. Because NHIC and HBW believe the District Court erred in ruling that the Commission could act as a court of competent jurisdiction under the Federal Act, NHIC and HBW appealed the District Court's opinion to this Court on December 28, 1993. Neither the Commission nor the Commissioners filed a cross appeal on the District Court's rulings.

After the Commission and Commissioners filed the Motions for Abstention or Abeyance presently before this Court NHIC and HBW received notice from the Virginia Supreme Court tentatively setting oral argument on the appeal pending before it for the week of February 21 through 25, 1994.

ARGUMENT

APPELLANTS JOIN IN THE MOTION TO ABSTAIN FROM HEARING THIS APPEAL AND REQUEST UPON ABSTENTION, THE DISTRICT COURT'S DECISION BE VACATED AND THE CASE BE REMANDED TO THE DISTRICT COURT.

NHIC and HBW believe that the District Court made the correct decision not to abstain below and that issue was not appealed or cross appealed. We recognize, however, that this Court has previously stated that even if the District Court's decision on abstention is not appealed, it can *"ex mero motu"* consider the issue of abstention. *Front Royal and Warren Industrial Park Corp. v. Town of Front Royal, Va.*, 945 F.2d 760, 763 (4th Cir. 1991); *Caleb Stowe Associates, Ltd v. County of Albemarle, Va.*, 724 F.2d 1079, 1080 (4th Cir. 1984); *AFA Distributing Co. Inc., v. Pearl Brewing Co.*, 470 F.2d 1210, 1213 (4th Cir. 1973). *Contra, Winston v. Children and Youth Services of Delaware County*, 948 F.2d 1380, 1384 (3rd Cir. 1991). Accordingly, it is appropriate to consider whether abstention is proper at this time.

We agree that the changed circumstances since the District Court heard this matter now warrant abstention. Five and one half months have passed since the suit was filed. The Virginia Supreme Court has advised all parties that it will hear oral argument during the third week of February 1994 instead of the one year anticipated when the suit was filed before the District Court. Under these circumstances, the length of delay and the resulting irreparable harm to NHIC and HBW appear greatly reduced. Therefore, as a matter of comity and judicial economy, NHIC and HBW agree that abstention would be proper provided that the District Court decision is vacated.

The case law is clear—if this Court abstains, then the decision of the District Court should be vacated. *See Front*

Royal, 945 F.2d at 765; *Caleb*, 724 F.2d at 1081; and *AFA Distributing*, 470 F.2d at 1214. If the lower court decision is not vacated and this Court abstains, then the District Court decision would become final and NHIC and HBW would be deprived of their right of appeal of that decision. On each occasion where this Court has abstained from determining the merits of an appeal of a district court's decision it vacated the judgment below. *Id.*

In addition to vacating the judgment below, it is appropriate for this Court to remand the case to the District Court. In *Caleb,* this court did exactly that:

> Although neither the plaintiffs nor the defendants contend that the case cannot be fully disposed of in Virginia state courts, we think it is appropriate for the district court to retain jurisdiction over the case "should anything prevent a prompt state court determination." *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 31, 79 S.Ct. 1070, 1074, 3 L.Ed.2d 1058 (1959); *Fralin & Waldron, Inc. v. City of Martinsville,* 493 F.2d at 483. In addition, the plaintiffs may wish to preserve their right to have their federal claims decided in federal court in the event of an adverse state determination of the questions of state and local law. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 419-422, 84 S.Ct. 461, 466-468, 11 L.Ed.2d 440 (1964).

724 F.2d at 1080-1081. Here, although the argument is scheduled for the week of February 21-25, 1994, there may be some unforseen delay and the District Court should retain jurisdiction in that event. The District Court noted this possibility when, although entering a final appealable judgment, it stated: "[s]hould delay occur, however, NHIC has leave to return to this Court to pursue its claim." (Memorandum Opinion, p. 33.) If

this Court abstains, the decision below must be vacated and remanded to the District Court.

CONCLUSION

If this Court decides to abstain as a result of the joint motion, it must also vacate the District Court's decision and remand the matter to the District Court with instruction to retain jurisdiction pending the outcome in the state court proceedings.

Respectfully submitted,

COHEN, GEITINGS,
DUNHAM &, HARRISON,P .C.

Harvey B. Cohen, Va. Bar #6440
R. Scott Caulkins, Va. Bar #23583
John C. Pasierb, Va. Bar #27446
2200 Wilson Boulevard, Suite 800
Arlington, Virginia, 22216
(703) 525-2260
(703) 525-2489 (fax)

Counsel for the Plaintiffs,
NHIC and HBW

CERTIFICATE OF SERVICE

I hereby certify that this day of January, 1994, I mailed, first class mail, postage prepaid, a copy of the foregoing to the following offices:

Patrick H. Cantilo
Randolph N. Wisener
Cantilo, Maisel & Hubbard, L.L.P.
111 Congress Avenue, Suite 1700
Austin, Texas 78701
(512) 478-6000

E - 1

No. 94-1039

IN THE

United States Court Of Appeals

FOR THE FOURTH CIRCUIT
(CA-93-1006-A)

NATIONAL HOME INSURANCE COMPANY;
HOME BUYERS WARRANTY CORPORATION II,

Plaintiffs - Appellants,

vs.

STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF VIRGINIA; THEODORE V. MORRISON, JR., individually and as Chairman of the State Corporation Commission of the Commonwealth of Virginia; PRESTON C. SHANNON, individually and as a Member of the State Corporation Commission of the Commonwealth of Virginia; HULLIHEN W. MOORE, individually and as a Member of the State Corporation Commission of the Commonwealth of Virginia,

Defendants - Appellees.

Filed: February 22, 1994

ORDER

Appellees filed a motion to place case in abeyance, appellants filed a response to the motion and appellees filed a reply in support of the motion.

The Court places this case in abeyance pending decision by the Virginia Supreme Court in *National Home Insurance Company v. State Corporation Commission,* record number 931052. The parties are directed to immediately notify this Court in that case.

For the Court

/s/ Bert M. Montague

Clerk

Record No. 931052

IN THE

SUPREME COURT OF VIRGINIA
AT RICHMOND

(S.C.C. Case No. INS930072)

NATIONAL HOME INSURANCE COMPANY
(A Risk Retention Group),

Appellant

v.

STATE CORPORATION COMMISSION,

Appellee.

BRIEF OF APPELLEE STATE CORPORATION COMMISSION

Stewart E. Farrar
Solicitor General
Anthony Gambardella
General Counsel
Peter B. Smith
Senior Counsel
Michael D. Thomas
Assistant General Counsel
State Corporation Commission
Office of General Counsel
P.O. Box 1197
Richmond, Virginia 23209

January 11, 1994

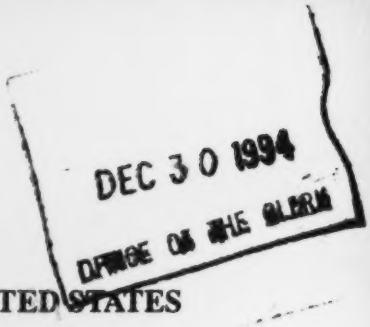
(EXCERPT)

ARGUMENT

The major issues in this case have already been decided by the United States District Court for the Eastern District of Virginia. Although that Court's decision is not absolutely binding on this one, the Commission submits that it is extraordinarily persuasive here. NHIC should bear a heavy burden to explain to this Court why a different result should be reached in this appeal, which burden it has failed to meet.

(4)

No. 94-883



In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Commonwealth of Virginia,
at the Relation of
The State Corporation Commission, *Petitioner*,
v.
National Home Insurance Company,
(a Risk Retention Group), *Respondent*.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

PETITIONER'S REPLY MEMORANDUM

Of Counsel:
Stewart E. Farrar
Solicitor General of the
State Corporation Commission
Anthony Gambardella
General Counsel
Peter B. Smith
Senior Counsel
Michael D. Thomas
Assistant General Counsel
State Corporation Commission
Office of General Counsel
P. O. Box 1197
Richmond, Virginia 23209

Patrick H. Cantilo
Counsel of Record

Randolph N. Wisener
Steven E. Adkins
Cantilo, Maisel & Hubbard, L.L.P.
Suite 1700
111 Congress Avenue
Austin, Texas 78701
(512) 478-6000
(512) 404-6550 (Telecopier)

Counsel for Petitioner

December 29, 1994

5

No. 94-883

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Commonwealth of Virginia,
at the Relation of
The State Corporation Commission, *Petitioner*,
v.
National Home Insurance Company,
(a Risk Retention Group), *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITIONER'S REPLY MEMORANDUM

The State Corporation Commission of the Commonwealth of Virginia (the "Commission") respectfully submits its Reply Memorandum in response to the Brief in Opposition to the Petition for a Writ of Certiorari (the "Opposition") filed with this Court by National Home Insurance Company ("NHIC").

Fundamentally, this case presents the question of whether the Products Liability Risk Retention Act, 15 U.S.C. §§ 3901-3906, (Pet. App. at 72a-88a) (the "Risk Retention Act") may be interpreted so as to impose upon the several states requirements for the establishment of their judiciaries not suggested by the federal statute. The Opposition confuses with this question the matter of how Virginia assigns subject-matter jurisdiction over risk retention groups among her state courts. In the case at bar, the first question had been resolved properly, and conclusively, by the United States District Court for the Eastern District of Virginia, Alexandria

Division (the "Federal Court"). Petitioner seeks this Court's review because the Virginia Supreme Court, rather than resolving the second question, one of State law, redecided the first, misinterpreting an unambiguous federal statute and thereby effectively reversing the Federal Court. The interpretation of that statute adopted by the Virginia Supreme Court would, additionally, render the statute violative of the Tenth Amendment.

The central thrust of the Opposition appears to be that the Commission has changed positions frequently and impermissibly. The record, however, is clear. The Commission has argued consistently that:

1. The Risk Retention Act is unambiguous and requires only that the orders it contemplates be entered by courts having personal and subject matter jurisdiction.

2. The unwarranted resort to legislative history so as to ascribe to the statute an unspoken requirement of institutional independence leads it to interfere in a manner violative of the Tenth Amendment with the establishment by the states of their judiciaries.

3. Once decided, properly, by the Federal Court, the question of what meaning should be read into the Risk Retention Act's use of the phrase "court of competent jurisdiction" had been resolved conclusively between the parties at bar and was not open to review by the Virginia Supreme Court.

4. It was the province of the Virginia Supreme Court to examine the question of whether Virginia had assigned subject-matter jurisdiction over risk retention groups to the Commission. The state court chose not to resolve that matter.

The Commission has never argued that the Virginia Supreme Court has violated the Tenth Amendment to the United States Constitution. Rather, the Commission has argued that certain provisions of the Risk Retention Act would violate the Tenth Amendment if they were given the interpretation espoused by NHIC and the Virginia Supreme Court.

As noted by the Commission in its Petition for a Writ of Certiorari (the "Petition"), it would be "unthinkable to suggest that state courts should be free to disregard the judgments of federal courts." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4468 (1981). Until the Virginia Supreme Court rendered its decision, the Commission had anticipated that the Virginia Supreme Court would decide whether, under state law, the Commission (upon which the Virginia Constitution has bestowed the powers of a court) possessed subject matter jurisdiction over risk retention groups doing business in Virginia. However, when the Virginia Supreme Court disregarded the Federal Court decision and redecided the issue of whether the Commission was a court of competent jurisdiction under the Risk Retention Act, the unthinkable occurred. Since that time, the Commission has consistently and vigorously pointed out the fatal defects in the decision by a majority of the Virginia Supreme Court.[1]

In the Petition for Rehearing to the Virginia Supreme Court, the first opportunity that the Commission had after learning of that court's decision, the Commission argued that it was improper under this Court's well-settled jurisprudence for the Virginia Supreme Court to redecide the issue squarely joined and decided by the Federal Court.[2]

---

1 NHIC's reliance upon *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1987), in support of the applicability of the "pressed or passed upon" rule is misplaced. The problem in *Bankers Life* was that the petitioner had made vague references to constitutional principles which did not preserve its constitutional arguments to this Court. Indeed, as this Court noted, "*Hathorn [v. Lovorn*, 457 U.S. 255 (1982)] would be apposite were we to conclude the appellant had adequately raised its claims on rehearing." *Bankers Life*, 486 U.S. at 77. A review of the Commission's Petition for Rehearing readily reveals that the claims now presented to this Court were specifically and more than adequately presented to the Virginia Supreme Court. *See, e.g.*, Pet. App. 59a-66a.

2 *See, e.g., Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903); *Crescent City Live-Stock Landing and Slaughter-House Co. v. Butchers' Union Slaughter-House and Live-Stock Landing Co.*, 120 U.S. 141 (1887).

As pointed out herein, the Commission's position has never changed, and NHIC has not been prejudiced. NHIC has had ample opportunity to assert every procedural, jurisdictional and other argument and position it could devise. It has engaged in an astute and widespread resort to multiple forums, seeking abstention and participation from each at various points that it found optimal given its particular interests. NHIC should not now be heard to lament the results of that strategy. It has been neither surprised nor misled by any position taken by the Commission regarding this matter.

CONCLUSION

For the foregoing reasons, and those discussed more fully in the Petition, this Court should grant a Writ of Certiorari and either consider the merits of this matter or summarily reverse the Virginia Supreme Court's decision.

Respectfully submitted,

The State Corporation
Commission of the
Commonwealth of Virginia

By Counsel
Cantilo, Maisel & Hubbard, L.L.P.
Patrick H. Cantilo
Randolph N. Wisener
Steven E. Adkins
Suite 1700
111 Congress Avenue
Austin, Texas 78701
(512) 478-6000
(512) 404-6550 (Telecopier)

Attorneys for Petitioner

Of Counsel:
Stewart E. Farrar
Solicitor General of the
State Corporation Commission
Anthony Gambardella
General Counsel
Peter B. Smith
Senior Counsel
Michael D. Thomas
Assistant General Counsel
State Corporation Commission
Office of General Counsel
P. O. Box 1197
Richmond, Virginia 23209

December 29, 1994